

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1388

To be argued by
SHIRAH NEIMAN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 74-1388

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAUL ORTEGA ALVAREZ, CIRO CALANA, JORGE
INFIESTA, CHARLES BUSIGO CIERE, DOMINGO
DEL CRISTO, ARMANDO ALVAREZ, and CIRILLO
FIGUEROA,

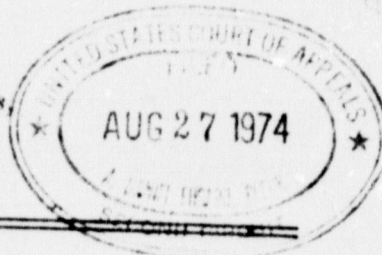
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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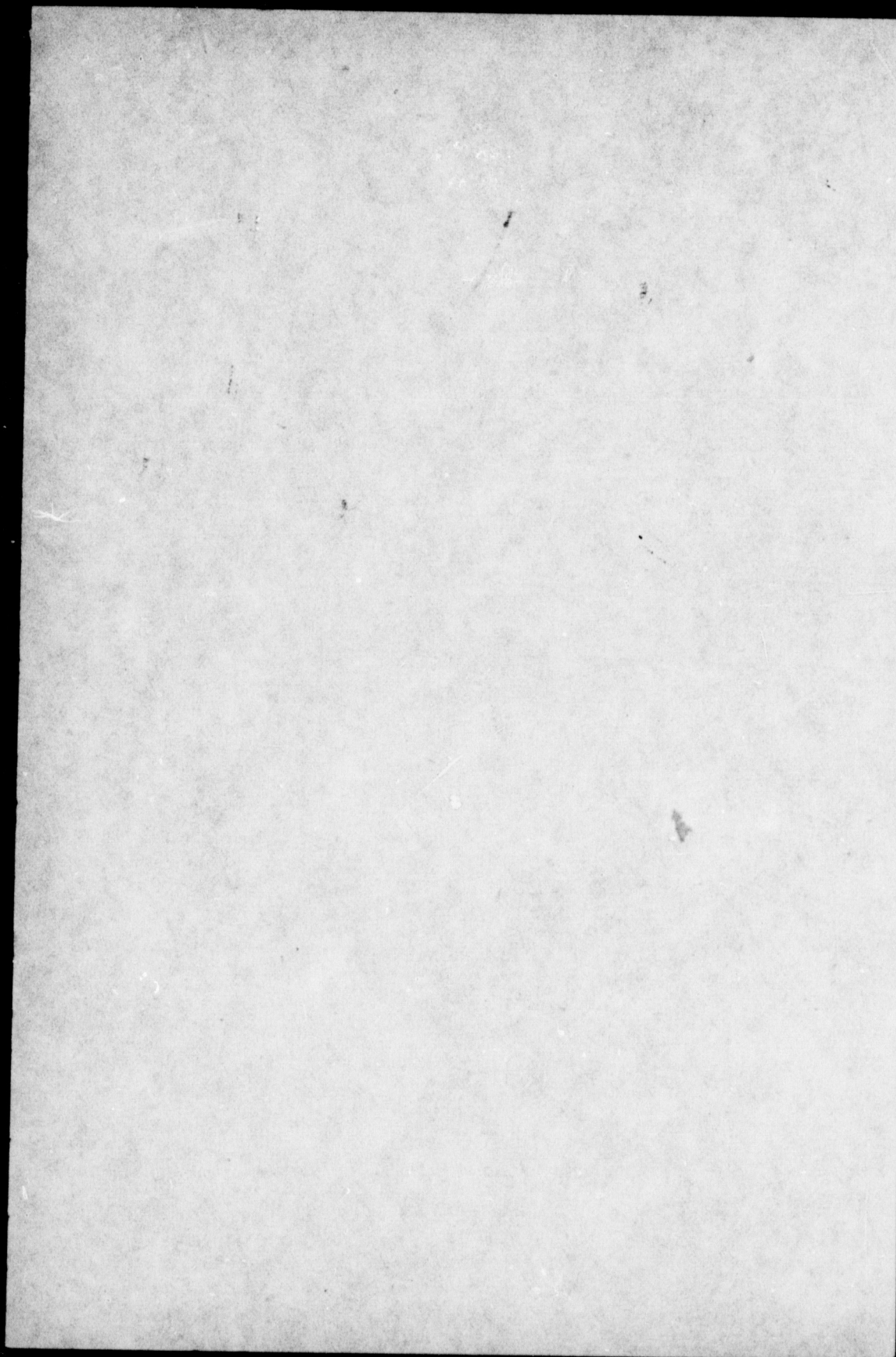


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1388

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAUL ORTEGA ALVAREZ, CIRO CALANA, JORGE INFUESTA,
CHARLES BUSIGO CIFRE, DOMINGO DEL CRISTO, ARMANDO
ALVAREZ, AND CIRILLO FIGUEROA,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Raul Ortega Alvarez, Ciro Calana, Jorge Infiesta, Charles Busigo Cifre, Domingo Del Cristo, Armando Alvarez and Cirillo Figueroa appeal from judgments of conviction entered on April 23, April 29 and April 30, 1974, in the United States District Court for the Southern District of New York, after a four-week trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 74 Cr. 18, filed January 9, 1974 charged the seven appellants and fifteen others in seventeen counts with various violations of the federal narcotics laws.*

* Indictment 74 Cr. 18 superseded Indictment 73 Cr. 950, filed October 10, 1973.

Count One charged all twenty-two defendants and two additional co-conspirators with conspiracy to traffic in narcotics in violation of Title 21, United States Code, Sections 173 and 174.* All but three defendants** were charged with one or more substantive offenses in violation of Title 21, United States Code, Sections 173 and 174.

Count Two charged Raul Ortega Alvarez (hereinafter "Ortega") and Ciro Calana with receiving, concealing, and facilitating the transportation of twenty kilograms of heroin in March, 1970.

Count Three charged Ortega, Jorge Infiesta and Luis Reyes with trafficking in one kilogram of heroin in March, 1970. Count Four charged Hector Echevarria with buying one-half kilogram of heroin in March or April, 1970. Count Five charged Charles Busigo Cifre with buying a total of one kilogram of heroin in March and/or April, 1970. Count Six charged Domingo Del Cristo with buying a total of one kilogram of heroin in March and/or April, 1970. Count Seven charged Francisco Perez and Orlando Gil with buying one-quarter kilogram of heroin in March, 1970. Count Eight charged Armando Alvarez with buying a total of six kilograms of heroin in March and/or April, 1970. Count Nine charged Hugo Viera with receiving, concealing, buying and facilitating the transportation of a total of four kilograms of heroin in March and/or April, 1970. Count Ten charged Jose Sarria with buying a total of two and one-half kilograms of heroin in March and/or

* Prior to trial the Government moved to withdraw paragraph 4q of Count One, charging conspiracy to distribute narcotics not in or from the original stamped package in violation of Title 26, United States Code, Sections 4701, 4703, 4704(a) and 7237(a), and it was stricken by order of Judge Metzner filed January 22, 1974.

** Francisca Calana (Ortega's sister and Ciro Calana's wife), Carlos Tapanes and John Doe a/k/a "Roberto" were not named in any substantive counts.

April, 1970. Count Eleven charged Cirillo Figueroa with buying a total of six and one-half kilograms of heroin in March and/or April, 1970. Count Twelve charged Joaquin Prada with receiving, concealing and facilitating the transportation of one and one-half kilograms of heroin in March or April, 1970. Count Thirteen charged Rigoberto Rosal Rodriguez with receiving, concealing, buying and facilitating the transportation of one kilogram of heroin in March or April, 1970. Count Fourteen charged Jose Otero with buying one kilogram of heroin in March or April, 1970. Count Fifteen charged Jose Ramirez Ramos with buying one-half kilogram of heroin in March or April, 1970. Count Sixteen charged John Doe, a/k/a Roberto Lopez with buying one-half kilogram of heroin in March or April, 1970. Count Seventeen charged Jose Aguilera with buying one-half kilogram of heroin in March or April, 1970.

Trial commenced on February 20, 1974 as to thirteen defendants.* At the conclusion of the Government's case Judge Metzner granted a motion for a judgment of acquittal

* Prior to trial Judge Metzner dismissed the conspiracy count and hence the indictment against Carlos Tapanes on double jeopardy grounds and granted a severance to Joaquin Prada, over Government objection, after the Government consented to a dismissal of the conspiracy count against him.

Orlando Gil entered a plea of guilty to a "tax count" information, 74 Cr. 180, filed the day before trial, and testified as a Government witness.

Six defendants—Reyes, Sarria, John Doe a/k/a "Roberto," Perez, Ramirez, and John Doe a/k/a "Roberto Lopez"—were unavailable for trial.

After trial, Perez surrendered, and on June 28, 1974 entered a plea of guilty to Count One and received a five year mandatory minimum sentence. On July 16, 1974 Prada entered a plea of guilty to Count Twelve and received a five-year mandatory minimum sentence. Jose Ramirez, who had been arrested in Florida shortly before trial, went to trial before Judge Metzner and a jury on July 25, 1974, and on July 26, 1974 was convicted on the conspiracy count and acquitted on Count Fifteen, the substantive count.

as to Rigoberto Rosal Rodriguez. On March 21, 1974, the jury found seven defendants guilty on all counts in which they were named, Cifre guilty of the conspiracy count only, and acquitted Francisca Calana, Hugo Viera, Jose Aguilera and Hector Echevarria.

On April 22, 1974, Judge Metzner imposed the following sentences: Ciro Calana was sentenced to concurrent terms of 6 years imprisonment on Counts One and Two. Jorge Infiesta was sentenced to concurrent terms of 8 years imprisonment on Counts One and Three. Armando Alvarez was sentenced to concurrent terms of 8 years imprisonment on Counts One and Eight. Cirillo Figueroa was sentenced to concurrent terms of 8 years imprisonment on Counts One and Eleven, to run consecutively to a 5 year sentence Figueroa was then serving, imposed by Chief Judge Edelstein on Information 71 Cr. 1167 on January 24, 1972 for violations of the federal narcotics laws.* Domingo Del Cristo was sentenced as a second offender to concurrent terms of 10 years imprisonment on Counts One and Six. On April 29, 1974, Raul Ortega was sentenced to terms of 12 years imprisonment to run concurrently on Counts One, Two and Three and concurrently with a 5 year sentence imposed in the Southern District of Florida on May 24, 1971 for a violation of the federal narcotics laws. On April 30, 1974, Cifre was sentenced as a second offender to a term of 10 years imprisonment on Count One.**

Infiesta, Cifre and Figueroa are presently serving their sentences. The remaining defendants are free on bail pending appeal.

* Figueroa's conviction on Information 71 Cr. 1167 was affirmed without opinion by this Court on February 28, 1972. *United States v. Figueroa*, Dkt. No. 72-1082.

** Jose Otero, who is not appealing, was sentenced to terms of 5 years imprisonment to run concurrently on Counts One and Fourteen and consecutively to a five year term of imprisonment imposed by Judge Metzner on Indictment 71 Cr. 720 on December 18, 1970 for violations of the federal narcotics laws.

Statement of Facts

The Government's Case

1. Introduction: Nature of the conspiracy

The trial of this case focused on the high level distribution in New York and New Jersey of 45 kilograms of heroin, which was part of a single sixty kilogram shipment of almost pure heroin imported into this country from South America.

On March 12, 1970, Raul Ortega had available for distribution approximately 45 kilograms of heroin from this 60 kilogram shipment, part of it stored at the home of Francisca and Ciro Calana, his sister and brother-in-law. Ortega recruited as his distributor his friend, co-conspirator Ramiro Gonzalez, who in turn recruited his friend, co-conspirator Miguel Rodriguez. Ortega, Gonzalez and Rodriguez solicited customers by spreading the word about the availability of the heroin at various Cuban bars and restaurants in upper Manhattan, and were soon actively engaged in cutting, mixing and delivering the heroin. The heroin was cut and mixed at the Calanas' home and at Jorge Infiesta's apartment in Manhattan. Deliveries of the heroin and the subsequent payments for it were made at a gas station in Manhattan owned by Joaquin Prada (which also served as a meeting place and message center for the buyers), in various bars, on street corners and in various apartments. The heroin was distributed (almost always on credit) from about March 12, 1970 until approximately May, 1970, and the customers made their last payments around September, 1970. The customers (all of whom were themselves large scale wholesaler-retailers who purchased from one-half to six and one-half kilos) were all aware of the fact that a large shipment was being distributed among many buyers. Unfortunately for the defendants, two kilograms from the shipment were sold to

undercover narcotics agents, and Gonzalez and Rodriguez who testified at the trial as Government witnesses, were arrested.* The defendants, in addition to Ortega, the Calanas and Infesta, were all purchasers of the heroin.

* Indictment 70 Cr. 524 (S.D.N.Y.) was filed on June 26, 1970, in seven counts, and charged Rodriguez, Gonzalez, Prada, Carlos Tapanes, Carlos Banos-Laszo and Eddie Perez with trafficking in narcotics and with conspiring to do so. All the charges related to negotiations with and sales to federal narcotics agents during the period March 12, 1970 until mid-June 1970.

Rodriguez entered a plea of guilty to several counts of the indictment shortly after trial commenced in January, 1971, and on February 19, 1971, was sentenced by Judge Bonsal to 10 years imprisonment to run concurrently on all counts. He is still serving that sentence.

Gonzalez was first arrested on the indictment in October 1970. After cooperating with the Government for about three months, he jumped bail and fled the country. He was re-arrested in this country in February, 1972 and has been incarcerated since then. In May, 1972 he entered pleas of guilty to several counts of Indictment 70 Cr. 524 and on October 12, 1972 was sentenced by Judge Mansfield to 10 years imprisonment to run concurrently on all counts. On November 12, 1973, Judge Mansfield reduced his sentence to 6 years. (Gonzalez' Rule 35 motion was timely because he had appealed his sentence).

Carlos Tapanes pled guilty to the conspiracy count and was sentenced by Judge Bonsal in February, 1971, to five years imprisonment.

Carlos Banos-Laszo pled guilty to a superseding information and in July, 1971 was sentenced by Judge Bonsal to a three year term of imprisonment which was later reduced to two years.

Joaquin Prada, the only defendant who went to trial, was convicted by a jury and in February, 1971, Judge Bonsal sentenced him to a 7 year term of imprisonment to run concurrently on three counts. His conviction was affirmed. *United States v. Prada*, 451 F.2d 1319 (2d Cir. 1971).

2. How Ortega got 45 kilos of heroin

At the end of January, 1970, Hovsep Caramian smuggled 60 kilograms of heroin into the United States from South America. He had the heroin brought to John F. Kennedy International Airport, where it remained in several suitcases in the trunk of a car until Roberto Arenas agreed to take possession of the heroin for himself and his partner, Segundo Coronel. Arenas sent Manuel Noa (Arenas' and Coronel's "stash man") with Caramian to the airport, where Noa picked up the heroin and brought it to Manhattan, where he kept it at two apartments which he had leased for the storage of narcotic drugs.* During the next few weeks, Noa tested the heroin, which he found to be very pure, and sold five kilograms. He eventually turned over the remaining 55 kilograms to Arenas because he felt he was being followed (Tr. 736-740, 687-690, 694-699).**

Thereafter Coronel advised Arenas that Raul Ortega would take the remaining 55 kilos. Arenas, who was a "babalao", or priest, in the Santeria religion, an Afro-Cuban religious cult, was Ortega's "padrino", or god-father, in that religion. Ortega came to New York from Florida, where he lived, sometime in mid or late February, 1970 and picked up the 55 kilos at Arenas' apartment on Audubon Avenue between 187th and 188th Streets. Ortega told Arenas that he was taking the drugs to his sister's apartment in Elizabeth, New Jersey. Shortly after this, Caramian asked Arenas to return 20 kilos, and Arenas called Ortega at his sister's home in New Jersey and told him to bring back 20 kilos. The next day at Arenas' apartment, Caramian took only 10 kilos from Arenas and Ortega, and

* Arenas and Noa testified at trial as Government witnesses.

** References to "Tr." are to the Trial Transcript; "GX" to Government Exhibits; "DX" to Defendants' Exhibits; "App. Br." to Appellants' Briefs; and "App." to appendix.

when Ortega left the apartment with the extra 10 kilos in a suitcase, Arenas saw him walk towards a blue Chevrolet with New Jersey license plates occupied by Ciro Calana, Ortega's brother-in-law (Count Two).^{*} Thus, around the end of February or beginning of March, 1970, Raul Ortega was left with 45 kilos of heroin. Over the next few months Ortega delivered money in payment for the heroin to Arenas at Arenas' Audubon Avenue apartment, and to Coronel (Tr. 741-749).

3. The Distribution Organization

On March 11, 1970, in Miami, Florida, Ortega asked Ramiro Gonzalez^{**} to fly up to New York with him to assist in distributing the 45 kilos; Gonzalez agreed. Ortega gave Gonzalez money for a heat sealer to seal plastic bags and for his plane fare. That evening they flew to Newark Airport and on the trip Ortega told Gonzalez that he had already sold 3 kilos to Jorge Infiesta, whom Gonzalez knew. Early the following morning, March 12, Ortega took Gonzalez to his sister's home at 38 Rankin Street in Elizabeth, where Gonzalez met Ciro and Francisca Calana. In front of Ciro Calana, Ortega took two suitcases out of a closet and exhibited their contents—almost 20 kilos of heroin—to Gonzalez, and told Gonzalez that the rest of the heroin was at another apartment nearby (Tr. 819-826). Later that day, after Gonzalez visited some bars in Manhattan where he discussed the heroin he and Ortega had for sale with various individuals, he went to Westbury, Long Island where he recruited his friend Miguel Rodriguez to assist him and Ortega in the distribution of the

^{*} Rodriguez and Gonzalez testified that a car of this description was owned by the Calanas and was one of several cars used by Ortega while he was in New York trafficking in narcotics (Tr. 99-100). GX 9 established that a 1967 blue Chevrolet was registered to Ciro Calana during 1970.

^{**} Gonzalez and Ortega met in 1961 when they both participated in the "Bay of Pigs" invasion of Cuba (Tr. 819, 1000).

drugs. Rodriguez returned with Gonzalez to Manhattan where Ortega, Gonzalez and Rodriguez discussed the cutting of the heroin and the division of profits. It was agreed that they would cut the pure heroin by withdrawing 9 ounces of heroin from each kilo and substituting 9 ounces of milk-sugar. Ortega was to receive \$18,000 from the sale of each kilo, from which he would give \$1,000 to his sister and brother-in-law for the use of their apartment. Rodriguez and Gonzalez would sell each kilo for more than \$18,000 and split the profit above that figure. Unbeknownst to Rodriguez, Gonzalez was also splitting money with Ortega, getting \$1,250 from Ortega for each kilo Gonzalez and Rodriguez sold.* In addition, the money earned from the sale of the 9 additional ounces created by the cutting process would be split three ways among Ortega, Gonzalez and Rodriguez ** (Tr. 827-829, 831-833, 118).

That very day, March 12, negotiations began for the sale of the 45 kilograms, including, ironically, negotiations which led to the sale on March 13, 1970 of one kilo to two federal agents (See *infra* at pp. 11-13). Rodriguez and Gonzalez, together and separately, visited several Cuban bars and restaurants and offered the heroin for sale (Tr. 87-99, 828-830). The word spread rapidly, for thereafter Rodriguez, Gonzalez and Ortega were approached by prospective buyers who heard about the shipment (Tr. 156, 208, 213, 226, 245, 900, 947). The heroin was sold from March 13th until approximately May, 1970. The average price for each kilo was \$20,000. Before delivery was made

* Gonzalez testified that Ortega told him that the cost of each kilo was \$14,500 and that he had to pay his sister and brother-in-law \$1,000. Ortega agreed to split with Gonzalez the difference between \$15,500 and the \$18,000 he was to receive for each kilo sold (Tr. 832).

** At an average sale price of \$20,000 per kilo, each 9 ounces was worth about \$5,000 to be split three ways. As will be seen, Ortega, Gonzalez and Rodriguez had several arguments about the "extra" ounces, each accusing the other of stealing them.

Ortega, Gonzalez and Rodriguez would cut, mix and rebag the heroin at the Calana's home with the assistance of Ciro Calana, and in the presence of Francisca Calana (Tr. 113-117, 852, 859). On one occasion several kilos of heroin were cut with Infesta and his partner, Luis Reyes, at Infesta's apartment in Manhattan (Tr. 115, 149-152, 869). The heroin was sometimes delivered by all three, sometimes by Gonzalez and Rodriguez and sometimes by Gonzalez or Rodriguez alone.* Ortega and Gonzalez made several trips back to Florida** during this period and on those occasions left Rodriguez with enough heroin to fill any outstanding orders (Tr. 852-853, 243).

During the course of the conspiracy, in addition to several Cuban bars, a gas station on 162nd Street and Amsterdam Avenue owned by Joaquin Prada (formerly owned by Charles Busigo-Cifre) served as a focal point for the activities of the sellers and buyers. Buyers came to the gas station looking for the sellers, and messages were left with Prada by the buyers and the sellers during the course of their negotiations for sale, delivery and payment. Prada stored heroin for Rodriguez in a safe in the gas station and also at his Manhattan apartment; some deliveries of heroin took place at the gas station, and Prada collected some money for the heroin there (Tr. 95-96, 101-105, 119, 156-158, 218-219, 232-233, 846-847, 884, 892-896, 900, 1380). All of the customers bought on credit and usually made payments in several installments. Gonzalez, Rodriguez and Ortega collected money together and sepa-

* Carlos Banos, Carlos Tapanes and Joaquin Prada also assisted in making various deliveries (Tr. 101, 104, 143-146).

** When he was in New York, Ortega stayed at the Paramount Hotel on West 36th Street, usually in rooms rented by Luis Reyes who was also from Florida. Gonzalez stayed with Ortega and at his aunt's apartment in Manhattan (Tr. 853-854, 120-121).

rately. When Ortega was unavailable, Gonzalez delivered the money he and Rodriguez had collected to Ciro or Francisca Calana in Elizabeth (Tr. 861). On several occasions Gonzalez and Rodriguez drove with Ortega to a building at 187th Street where Ortega took a shopping bag filled with money to the apartment of Roberto Arenas. Gonzalez and Rodriguez never saw or met Roberto Arenas during the course of the conspiracy, but Ortega told them he was delivering money to Arenas, his "padrino" (Tr. 866-867, 120, 195-196).

When all the heroin was sold, Ortega, Gonzalez and Rodriguez had a meeting to try to settle their accounts but were unsuccessful, each accusing the other of cheating and even stealing some of the heroin (Tr. 275-277, 977).

4. The transactions with the federal agents

On March 12, the same day Rodriguez was recruited by Gonzalez to distribute the 45 kilo shipment, Agent Thomas Angioletti of the Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, was introduced by an informant, Mike Fiore,* to Rodriguez and Prada. Angioletti was taken to Prada's gas station, where he was supposed to receive a sample of cocaine. The cocaine being unavailable, the discussion turned to heroin, and Prada gave Angioletti a sample of 62% pure heroin which he removed from a pipe located in the office of the gas station (Tr. 1372, 1378-1387; GX 12). Rodriguez and Prada told Angioletti that they could sell him pure heroin for \$25,000 a kilo and could provide up to three kilos (Tr. 1382). On March 13th, after arranging to buy one kilo of heroin, Angioletti returned to the gas station with Agent Frank Tumillo at 7:15 p.m. and received a kilo of 91%

* Rodriguez and Gonzalez called Fiori "Sifori", "Sifori", or "Safari".

pure heroin in exchange for \$25,000.* For the first time the agents saw Ramiro Gonzalez, although they did not meet him (Tr. 1388-1391).

The heroin sold to the agents had been brought into New York from New Jersey earlier that day by Ortega in his sister's car. Ortega gave the car with the heroin to Gonzalez and Rodriguez at Infiesta's apartment, 666 West 162nd Street, Apt. 2E (which was just a few blocks from Prada's gas station), and waited at Infiesta's while the kilo was sold. After the sale, Gonzalez and Rodriguez returned to Infiesta's where in the presence of Ortega, Infiesta and his partner Luis Reyes, the \$25,000 was split up (Tr. 102-106, 834-837, 845-849). Surveilling agents observed a car, registered to Francisca Calana, pull into the gas station at about 7:15 p.m., and later that evening saw the same car being driven by Rodriguez to his home in Westbury, Long Island (Tr. 1525-1527; GX 3).

On March 16, 1970, Agents Angioletti and Tumillo met with Gonzalez and Rodriguez at Luigi's, a restaurant in Manhattan. Raul Ortega was sitting at the bar in the restaurant ** while the others had a conversation in which Gonzalez and Rodriguez voiced their suspicions that Angioletti and Tumillo might be federal agents. Once their fears were allayed, future sales of large quantities of heroin were discussed (Tr. 1400-1401, 1404-1405, 133-134).

* The one kilogram of heroin and the sample from the day before were introduced into evidence at trial (GXs 12 and 13; Tr. 1404, 1551).

** Angioletti and surveillance agents identified Ortega as the individual who entered the restaurant with Gonzalez, sat at the bar while Gonzalez spoke with the agents, and then left the restaurant with Gonzalez and Rodriguez. The car which they got into when they left the restaurant and which they drove to Prada's gas station was rented by Luis Reyes over Jorge Infiesta's signature (Tr. 1401, 1488-1489, 1607-1610; GX 11).

On March 19, 1970, Gonzalez and Rodriguez were to deliver another kilo of heroin to the agents but the delivery never took place. Rodriguez called the transaction off because when he went to Infiesta's apartment to look for Ortega, who was supposed to bring the heroin from New Jersey, he felt that he was being followed by law enforcement officers. Rodriguez was, of course, correct, and he was observed entering and leaving Infiesta's building (Tr. 1409-1413, 136-142, 1611-1613).

On March 30, the agents met with Rodriguez and Gonzalez and arrangements were made for the delivery of a second kilo of heroin on the following morning. On March 31, at 7:00 a.m., the delivery was made at a diner in Hicksville, Long Island. The heroin was 82% pure (Tr. 1415-1417; GX 14).

The agents met with Rodriguez and Gonzalez once again on April 20, 1970 and offered to purchase 10 kilos of heroin. Gonzalez and Rodriguez refused to deliver that much at once and would only consent to deliver five at a time. No agreement was reached (Tr. 1419-1420).

On April 29th the agents made a deal to purchase 10 kilos of heroin on the morning of May 1st and on that morning brought a quarter of a million dollars to a motel in Hicksville, Long Island. Gonzalez and Rodriguez never showed up (Tr. 1421-1423).

During the course of their undercover dealings with Rodriguez and Gonzalez, the Bureau of Narcotics and Dangerous Drugs set up an observation point in a rectory across the street from Prada's gas station. On several occasions from March 25, 1970 until June 19, 1970, photographs were taken of individuals who frequented the gas station, including Ortega, Rodriguez, Del Cristo, Cifre, Viera, Banos and Tapanes (Tr. 189-191, 297-302; GXs 28-50).

5. The Defendants

a. Raul Ortega

In addition to what was outlined above, Ortega sold heroin to his own customers—Infiesta and Reyes, Juan Chaveco and Jose Angel Aguilera, a/k/a "El Moro" (Tr. 152-153, 263-264, 953, 969-971, 822, 828, 869, 871). The Government introduced evidence to corroborate the testimony of Arenas, Noa, Rodriguez and Gonzalez. Surveilling agents testified to the presence of Francisca Calana's car at Prada's gas station on March 13th, the night of the delivery of the first kilo to the agents (Tr. 1525). Agent Angioletti and surveilling agents identified Ortega as the individual who sat at the bar in Luigi's on March 16th * (Tr. 1401, 1488-1489, 1607-1610). Hotel records from the Paramount Hotel showed that Ortega and Gonzalez stayed there using their own names on one occasion during the course of the conspiracy, and that Luis Reyes maintained a room at the hotel from February, 1970 until October, 1970 (Tr. 789-793; GXs 3, 4 and 5). Rodriguez and Gonzalez testified that they had gone with Ortega to the New Jersey Motor Vehicle Bureau where (1) Rodriguez registered a car in his own name but using the Calana's address and (2) Ortega registered a car using the name of a friend (Tr. 124, 950-951). The Government produced the two registrations dated March 19, 1970 to corroborate their testimony (GXs 25 and 26; Tr. 630-633). The testimony of Rodriguez and Gonzalez that Ortega traded in the car registered in his friend's name for a new car and had Rodriguez bring him cash from heroin sales for the balance of the purchase price was partially corroborated

* Although Ortega had been seen by the agents at Luigi's on March 16th, they did not know his identity and had insufficient evidence to link him to the sales or to any conspiracy.

by the documents of the car dealer who handled the transaction * (Tr. 1594-1601; GX 27).

The Government also introduced a false exculpatory statement made by Ortega to a narcotics agent on April 1, 1971, in which he denied that he had been in New York or New Jersey during the two years prior to April 1st (Tr. 1482).

b. Ciro Calana

In February, 1970, Ortega told Arenas that he was taking the 55 kilos of heroin to his brother-in-law's house in Elizabeth, New Jersey. Thereafter, Arenas contacted Ortega there when he had to get 20 kilos back to Caramian, and Arenas saw **Ciro Calana** sitting in his blue Chevrolet, waiting for Ortega, the day Ortega brought the 20 kilos to Arenas' apartment (Count Two) (Tr. 743-746).

On the morning of March 12, 1970, Ortega took Gonzalez to 38 Rankin Street, where he showed Gonzalez, in **Ciro Calana's** presence, two suitcases filled with almost 20

* The proof established that on March 19, 1970 Ortega registered a 1967 Chevrolet using his friend's name, Pedro Rios and his father-in-law's address (Tr. 950-951; GX 26). At that time Ortega was using Rios' name without his permission (Tr. 1586-1587). On April 2, 1970 Ortega switched the Pedro Rios registration from the 1967 Chevrolet to a 1969 Chevrolet (GX 26), which Gonzalez drove during the course of the conspiracy (Tr. 952). On April 29, 1970 Ortega took Pedro Rios to a Buick dealer in Manhattan where he traded in the 1969 Chevrolet Camaro for a 1970 Skylark, still using the name Pedro Rios (Tr. 1594-1601, 951-953). Ortega also paid a total of \$2,100 in cash for the Skylark. This evidence tended to show that Ortega was taking steps to conceal his identity from any law enforcement officers who took down his license plates. More important, however, it bolstered the credibility of Gonzalez and Rodriguez by showing that they were aware of and a part of Ortega's activities during this time period.

kilos of heroin (Tr. 823-826). Ortega told Gonzalez and Rodriguez that he was giving the Calanas \$1,000 per kilo sold for their assistance (Tr. 832, 107). Thereafter, over the next few months, Ciro Calana, in addition to storing heroin in his apartment, engaged in the following activities: he came to New York with Ortega on one or two occasions when they met with Rodriguez and Gonzalez and discussed the ongoing negotiations for the sale of the shipment, and on one occasion he was present when Ortega drove to deliver three kilos of heroin to a customer (Tr. 97, 102, 148-149, 152-153); he participated in cutting and mixing the heroin in his home on numerous occasions, and he was present at Infiesta's apartment on the day heroin was cut there (Tr. 113-117, 149-151, 836); he fetched heroin from a storage place near his home when it was needed (Tr. 857-858); he turned over 6½ kilos of heroin to Rodriguez on one occasion (Tr. 243); he accepted money turned over to him by Gonzalez for Ortega from the sales of heroin (Tr. 861-862); and his and his wife's cars were used during the course of the conspiracy (Tr. 102-103, 845-846).

c. Jorge Infiesta

On the plane trip from Miami to Newark, Ortega told Gonzalez that he had already sold 3 kilos of heroin to his customer, Infiesta (Tr. 822). On March 12th, after Ortega and Gonzalez visited the Calanas, they drove to Manhattan, where they met with Infiesta, who took Gonzalez aside and asked him to try to get Ortega to lower the price of each kilo (Tr. 828). Later that day, Rodriguez was introduced to Infiesta for the first time at the 005 Bar, which was a few blocks from Infiesta's apartment (Tr. 98-99). The 005 Bar was a hangout for many of the narcotics dealers in this case and the evidence, both testimonial and photographic, showed that Infiesta frequented that bar (Tr. 282-283; GXs 58, 59A, 61, 62, 63A). On March 13, 1970, Ortega, Rodriguez and Gonzalez met at Infiesta's apartment

before Gonzalez and Rodriguez went to deliver the first kilo to the agents at Prada's gas station, and they all met again at Infiesta's after the delivery to split up the \$25,000. Infiesta and his partner Luis Reyes were both present (Tr. 837, 847-849, 102-106). Sometime during the first few days following March 12th, Ortega brought between four and seven kilos of heroin to Infiesta's apartment where Ortega, Infiesta and Gonzalez cut the heroin with paraphernalia produced by Infiesta, while Rodriguez, Reyes and Ciro Calana watched. When they were finished Ortega gave Infiesta and Reyes 1 kilo of heroin (Count Three).^{*} Ortega delivered another kilo of heroin to Reyes at the Calana's home in New Jersey and two more kilos of heroin to Infiesta and Reyes at Infiesta's apartment. Gonzalez collected some money from Infiesta and Reyes for Ortega (Tr. 867-873, 149-152).

In addition to the above, other evidence linked Infiesta to the conspiracy: when Cirillo Figueroa first spoke to Rodriguez and Gonzalez, he told them that he had been buying his heroin from Infiesta and Reyes but wanted to deal directly with Gonzalez and Rodriguez (Tr. 213).^{**} On March 12, 1970, a car was rented in New Jersey in the name of Luis Reyes over the signature and name of Jorge

^{*} Gonzalez testified that this incident occurred on the morning of March 13th, that 7 kilos were cut to make 8 kilos and 9 ounces, and that Ortega gave Infiesta and Reyes 1 kilo which Infiesta put in a car outside his apartment building (Tr. 867-869). Rodriguez testified that this incident occurred a day or so after the 13th, that 4 kilos were cut to 5, and that Ortega gave Infiesta and Reyes 1½ kilos and Infiesta put ½ kilo in a car outside his apartment building (Tr. 149-152). Rodriguez recalled that Ciro Calana was present, but Gonzalez did not. Rodriguez also recalled that while they were cutting the heroin Cirillo Figueroa came by but did not come in the apartment (Tr. 152).

^{**} Similarly, Jose Ramirez Ramos told Rodriguez that he had been buying from Luis Reyes, but preferred to buy directly from Rodriguez (Tr. 257-258).

Infiesta, and returned on April 21, 1970. That was the car Ortega used when he drove to and from Luigi's restaurant on March 16th (Tr. 1610; GX 11). On March 19, 1970, the day on which the sale to the agents fell through (see *supra* at 13), after Rodriguez left Infiesta's apartment (where he had gone to look for Ortega), he met Figueroa at the 005 Bar and had him go to Infiesta's apartment to call Infiesta on the intercom and warn him that federal agents were watching the area. On that evening the agents had in fact observed Rodriguez and Gonzalez entering and leaving Infiesta's building (Tr. 140-142, 1611-1613). Many telephone calls were made from Luis Reyes' telephone number in Florida to the telephone in Infiesta's apartment (GXs 22, 23A; Tr. 1556-1558, 1563, 1568-1570). Photographs taken on three days in May, 1970, at the 005 Bar, showed Infiesta there on numerous occasions and showed him in the company of Figueroa (GXs 58, 59A, 61, 62, 63A; Tr. 282-283).

d. Cirillo Figueroa

Cirillo Figueroa purchased a total of 6½ kilos of heroin from this shipment on six separate occasions during March and April, 1970. Shortly after March 13, 1970, Figueroa approached both Rodriguez and Gonzalez at the 005 Bar and asked to purchase heroin, indicating that he had been buying from Infiesta and Reyes but wanted to buy directly from Gonzalez and Rodriguez. Arrangements were made for Rodriguez to deliver 1 kilo for Figueroa at an apartment on 175th Street and Broadway (Tr. 213-215).^{*} After the first purchase, Figueroa bought another kilo which Rodriguez delivered to him at the 005 Bar. Figueroa asked Rodriguez to deliver the third kilo he bought to an indivi-

^{*} Figueroa gave Rodriguez permission to stash ¼ kilo at that apartment, and at a later date accompanied Rodriguez to that apartment so that Rodriguez could pick up the ¼ kilo which he later delivered to Francisco Perez and Orlando Gil (Tr. 215, 239-240).

dual known to Rodriguez as "Blanco Sera" or "Mr. White"—the defendant Rigoberto Rosal-Rodriguez—at Prada's gas station, which Rodriguez did.* Rodriguez arranged for Figueroa to pick up a fourth kilo of heroin from Prada at the gas station. Prada took Figueroa, who was with a person by the name Luis Despaines, to his apartment, where Figueroa took 1½ kilos instead of one kilo. Rodriguez and Carlos Tapanes delivered another kilo which had been picked up at Prada's apartment, to Figueroa, by leaving it in a specified car at 149th Street and Broadway (Tr. 217-225). The last delivery to Figueroa was made by Gonzalez, who turned over 1 kilo to Figueroa's messenger, Luis Despaines, at Hugo "El Americano's" apartment (Tr. 943-946).

All of the heroin was purchased on credit with Figueroa making installment payments after the deliveries.

Photographs corroborated the testimony of Rodriguez and Gonzalez that Figueroa frequented the 005 Bar and had meetings there with Infiesta, Gonzalez and Rodriguez (Tr. 250-285; GXs 54, 55, 61, 62, 63A, 64, 66-73), and surveillance placed Figueroa and Rodriguez together at the 005 Bar on March 24, 1970 (Tr. 1617-1618). Figueroa's involvement in the incident that occurred on March 19th is described *supra* in Section c.

* The Court dismissed the conspiracy count against Rigoberto Rosal Rodriguez on two grounds. First, because he had only participated in an isolated transaction and second, there was no proof that he knew there was heroin in the bag that had been delivered to him. The substantive count was apparently dismissed on the second ground (Tr. 1826-1828). The Government opposed the dismissal arguing that Rigoberto Rodriguez' comment to Miguel Rodriguez, that he was going to leave the gas station quickly because "it was hot" (Tr. 219), was certainly sufficient to establish that he knew what he possessed was heroin, and also independent evidence from which the jury could find that he was participating in a broader conspiracy, e.g., *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973); *United States v. DeNoia*, 451 F.2d 979 (2d Cir. 1971).

e. Domingo Del Cristo

Del Cristo purchased one-half kilo of heroin on two occasions from this shipment. Gonzalez testified that on March 12, 1970, after he had recruited Rodriguez to assist in distributing the heroin, he and Rodriguez met Del Cristo at Prada's gas station, where Del Cristo sought to purchase $\frac{1}{2}$ kilo of heroin on credit. Arrangements were made with Del Cristo to deliver the $\frac{1}{2}$ kilo the following night at Prada's gas station. After Rodriguez and Gonzalez split up the money from the sale to the agents at Infesta's apartment, they returned to the gas station to deliver $\frac{1}{2}$ kilo to Del Cristo and $\frac{1}{2}$ kilo to Cifre (see *infra* at 21). From the car Gonzalez saw Rodriguez hand the $\frac{1}{2}$ kilo of heroin to Del Cristo. Del Cristo had problems paying for the heroin, and co-defendant Roberto Lopez made an \$1,800 payment for Del Cristo to Ortega, Gonzalez and Rodriguez at the El Gallo de Maron Bar.* Moreover, on that occasion, Del Cristo wanted to buy another $\frac{1}{2}$ kilo of heroin, and Ortega authorized the sale despite Gonzalez' protests about the difficulty of collecting from Del Cristo. Rodriguez was to deliver the second $\frac{1}{2}$ kilo and both he and Ortega told Gonzalez that the heroin had been delivered (Tr. 891-898).

Photographs showed that Del Cristo frequented Prada's gas station and an agent testified that he saw Del Cristo on many occasions during the Spring of 1970 at the gas station and the 005 Bar (Tr. 1615-1617; GX 45A).

Upon his arrest, after being advised that he was charged with purchasing heroin from Gonzalez and Rodriguez in March and April, 1970, Del Cristo denied the charges and said that he could prove his innocence because he had been

* Roberto Lopez was himself a purchaser of a total of $1\frac{1}{2}$ kilos of heroin ($\frac{1}{2}$ kilo on three occasions) from this shipment (Tr. 256-257).

in the hospital during this time period and even had scars. No such proof was produced at trial (Tr. 1710-1713).

Rodriguez' testimony about Del Cristo was as follows: Rodriguez recalled that Del Cristo was looking for Ortega in order to buy heroin from him and he also recalled that thereafter he, Rodriguez, collected money from Del Cristo in payment for heroin. He did not, however, recall making deliveries of heroin to Del Cristo. He also recalled a conversation he had at the El Gallo de Maron bar with Ortega, Gonzalez, Roberto Lopez, Del Cristo and him, during which Lopez said something to suggest that the heroin which he, Rodriguez, had delivered to Del Cristo had been for him. Rodriguez also testified that Del Cristo conveyed a message to him from Echevarria, that Echevarria wanted to see Rodriguez at his supermarket (Tr. 207, 225-229).

f. Charles Busigo Cifre

On March 12, 1970, Gonzalez met Cifre at the El Gallo de Maron Bar where Cifre indicated he intended to buy a large amount of heroin from this shipment. Gonzalez agreed to deliver one-half kilo to Cifre the following evening at Prada's gas station, which Cifre had owned before Prada, who had worked there for him. On the afternoon of March 13, 1970, Cifre, Gonzalez, Rodriguez and Prada met at a bar across the street from Prada's gas station, where Cifre pointed out an individual who would accept delivery for him later that evening. That night, after Gonzalez and Rodriguez delivered 1½ kilo to Del Cristo at the gas station, they delivered 1½ kilo to Cifre's man, who Gonzalez later learned was Oasis Valido. Cifre paid for the heroin in two installments: the first installment to Prada, who gave it to Rodriguez, who gave it to Gonzalez; the second installment Cifre gave directly to Gonzalez (Tr. 884-889). Several days later Cifre ordered another 1½ kilo of heroin and on this occasion Rodriguez, who had stored some heroin at Prada's apartment, delivered the heroin to

Oasis Valido in front of Prada's apartment building (Tr. 889-891, 158-161). Cifre again paid for the heroin in installments, giving partial payment to Prada, to be turned over to Gonzalez and Rodriguez (Tr. 160-161).*

In addition to purchasing heroin for himself, Cifre assisted Hector Echevarria, who was having difficulty making payments for the $\frac{1}{2}$ kilo he had purchased. Both Gonzalez and Rodriguez spoke to Cifre about Echevarria's failure to pay and at one point Cifre agreed to partially guarantee Echevarria's debt but eventually reneged on that agreement. Later on Cifre accompanied Gonzalez to Echevarria's supermarket, where Echevarria's wife turned over about \$1300 in one-dollar bills (Tr. 210-211, 875-880).

g. Armando Alvarez

Armando Alvarez, a/k/a "El Chino", purchased a total of 6 kilograms of heroin on four separate occasions from Ortega, Gonzalez and Rodriguez. Sometime in March,

* Both Gonzalez and Rodriguez testified to the second sale of $\frac{1}{2}$ kilo to Cifre, agreeing that delivery was made by Rodriguez in front of Prada's building to Cifre's pick-up man and that payments were made through Prada. Rodriguez however did not testify about the first $\frac{1}{2}$ kilo sale and obviously did not recall it. He testified that about a week after March 13th he met Cifre at Prada's gas station where Cifre asked to deal directly with Rodriguez and Gonzalez and complained about his dealings with Prada. Cifre told Rodriguez that he had purchased from Prada a $\frac{1}{4}$ kilogram of heroin which Rodriguez had sold to Prada. Rodriguez told Cifre that when he had completed his transaction with Prada he could deal directly with Rodriguez and Gonzalez. Thereafter, according to Rodriguez, Cifre, Gonzalez, Rodriguez and Prada met at a bar across the street from Prada's gas station where Cifre pointed out his pick-up man and Rodriguez delivered the heroin to him in front of Prada's building (Tr. 156-160). Rodriguez' version of these events obviously has elements from the two sales about which Gonzalez testified.

1970, Hugo Viera, a/k/a Hugo "El Americano", went looking for Gonzalez at Prada's gas station and told Gonzalez that he and his friend "El Chino" had heard that Gonzalez had heroin and "El Chino" was interested in buying some. Gonzalez made an appointment to meet Hugo and "El Chino" at a bar and met them there with Miguel Rodriguez. At the bar the quality and price of the heroin was discussed* and arrangements were made to deliver one kilo of heroin to "El Chino" for \$20,000. Rodriguez delivered the one kilo to "El Chino", who lived in Florida, a block or two from Hugo Viera's apartment in Manhattan (Tr. 231-234, 899-904). Thereafter, on two occasions, Gonzalez delivered two and one kilogram quantities of heroin respectively to "El Chino" in the presence of Hugo "El Americano" at Hugo's apartment.** The final delivery to

* Gonzalez testified that the purchase of heroin and the arrangements made to deliver one kilo to "El Chino" were discussed at the bar. Rodriguez testified that there was no discussion of heroin at the bar, but that shortly after the meeting at the bar, arrangements were made to sell one kilo to "El Chino" (Tr. 231-233, 900-903).

** Gonzalez testified that between the first and second deliveries to "El Chino," the following took place: Gonzalez was at a religious party at "El Chino's" house in Florida when he and "El Chino" made some telephone calls to New York and arranged for Miguel Rodriguez to deliver one kilo of heroin to Hugo "El Americano" in New York. Subsequently Rodriguez advised Gonzalez that the delivery was made to Hugo, and "El Chino" advised Gonzalez that Hugo had sold the heroin to his own customers although he was supposed to have held it for "El Chino". Because Hugo was refusing to pay for the heroin, Gonzalez sent Rodriguez to find Hugo and collect the \$20,000. Rodriguez returned to the Gallo de Maron bar, followed by Hugo, who turned over \$14,000 to Gonzalez in front of Ortega. Hugo delivered the balance of the money to Gonzalez the following day at Gonzalez's aunt's house (Tr. 908-915).

Rodriguez did not recall delivering one kilo of heroin to Hugo or any directive by Gonzalez from Florida to do so. It was his recollection that the first kilo of heroin delivered to "El Chino"

[Footnote continued on following page]

"El Chino" was made by Gonzalez, Ortega and Rodriguez who delivered two kilograms of heroin to "El Chino" on Broadway and 158th Street.* In addition to making payments in cash, "El Chino" gave Gonzalez two-eighths of a kilo of cocaine as part payment for the last delivery (Tr. 909-922).

h. The other defendants

Jose Angel Aguilera a/k/a "El Moro," Ortega's customer, came to New York from Florida and purchased 1½ kilo of heroin which he picked up at the Calanas' home and was going to bring to customers in Chicago (Tr. 261-265, 970-971).

Jose Otero, a/k/a "Pepe", looked for Gonzalez and Rodriguez and told them he wanted to buy some of the heroin he had heard they had. A kilo of heroin was delivered to Otero on the street in front of the Cuba bar.** Otero also agreed that Gonzalez, who owed Otero seven ounces of heroin from a prior transaction, would deliver seven ounces to Jose Sarria, another customer, to satisfy a debt that Otero had with Sarria. In connection with a one kilo delivery to Sarria, Gonzalez delivered an additional seven ounces (Tr. 946-950, 960, 245-246, 254-255).

was given by "El Chino" to Hugo and somebody named Jorge Malagamba and that payment for that kilo was made in two installments: \$4,000 through Prada, and \$14,000 which he and Hugo brought to the Gallo de Maron bar to give to Gonzalez (Tr. 235-237).

* Rodriguez recalled the amount was 1½ kilos and did not recall that Gonzalez or Ortega were present (Tr. 237-238).

** Gonzalez testified that he and Ortega were present in the Cuba Bar when Rodriguez delivered a kilo to Otero in the trunk of a car outside the bar (Tr. 948-949). Rodriguez testified that he delivered 1½ kilos to Otero in the trunk of a car outside the Cuba bar but did not recall that Gonzalez and Ortega were present (Tr. 254-255).

Hector Echevarria told Rodriguez, who had gone to Echevarria's supermarket in response to a message Rodriguez received from Domingo Del Cristo, that he, Echevarria, had heard of the available heroin and he inquired about the price per kilo. He ordered $\frac{1}{2}$ kilo, which was delivered to him at his supermarket by Rodriguez. Unsuccessful attempts were made by both Gonzalez and Rodriguez to collect payment from Echevarria, and Charles Cifre intervened. Eventually Echevarria paid \$1,300 to Gonzalez, and Rodriguez assumed the responsibility for the rest of Echevarria's debt. In July, 1970 Echevarria paid \$3,000 to Rodriguez by providing \$3,000 for Carlos Tapanes' bail, and made sporadic smaller payments until about the end of August or beginning of September, 1970 (Tr. 207-212, 874-880).

Jose Sarria, who had heard about the heroin shipment, purchased a total of about $2\frac{1}{2}$ kilos of heroin from Ortega, Gonzalez and Rodriguez which was delivered to him and his pick-up man John Doe, a/k/a "Roberto" (Tr. 262-277, 954-961).

Roberto Lopez purchased $\frac{1}{2}$ kilo of heroin on three separate occasions and the deliveries were made by Rodriguez (Tr. 256-257, 965-966).

Jose Ramirez-Ramos, who had also heard about the shipment and had been buying from Luis Reyes, purchased $\frac{1}{2}$ kilo on two separate occasions and the deliveries were made by Rodriguez (Tr. 257-260).

i. Orlando Gil and Francisco Perez

Gonzalez and Rodriguez made arrangements to deliver $\frac{1}{4}$ kilogram of heroin to Francisco "Paco" Perez and Orlando Gil, and Rodriguez delivered the heroin to them in the vicinity of 175th Street and Broadway. Gil's testimony confirmed the sale and delivery (Tr. 647-650). Perez

and Gil thereafter came back for more heroin, saying that they had a black customer with lots of money. Gil and Perez had indeed been selling to a black customer, who turned out to be an undercover federal narcotics agent, Fred Ford.* Due to Perez and Gil's failure to pay for the $\frac{1}{4}$ kilo promptly, Gonzalez did not deliver more heroin to them (Tr. 238-242, 966-969, 643-644).

The Defense Case

All the defendants vigorously attacked the credibility of Gonzalez and Rodriguez, arguing that they fabricated their testimony in order to curry favor with the Government and gain reduced sentences and more limited prosecutions.

1. Francisca Calana

Francisca Calana took the witness stand and denied that any heroin had been stored in her house by her brother and even denied that her brother had been in New Jersey during the months of March, April and May 1970. She denied ever meeting Gonzalez and Rodriguez, and ever receiving any money from Gonzalez. Her employment records during the time period were produced to show that she was not at home at 6:00 a.m. on March 12, 1970, the day Gonzalez testified he had first met her, and to show that

* Fred Ford testified as a Government witness. On March 12, 1970, Perez and Gil had delivered $\frac{1}{2}$ kilo of heroin to Ford. (This $\frac{1}{2}$ kilo had not been purchased from the 45 kilo shipment because the first deliveries from that shipment by Gonzalez and/or Rodriguez were not made until March 13th.) On March 24, 1970 Perez and Gil met with Ford again, and when Perez left to get $\frac{1}{2}$ kilo of heroin for Ford from his source, he was seen in the Blue Mirror Cafe in Manhattan with Miguel Rodriguez. Shortly after Rodriguez and Perez left the cafe Perez called Gil and Ford and called the deal off because Perez felt he was being followed; he was correct. When Rodriguez left the Blue Mirror Cafe, he drove to the 005 bar where he met with Figueroa (Tr. 669-672, 682-685, 1617-1618).

she worked most days from 6:00 a.m. to 5:00 p.m. and therefore could not have been at home during those hours (Tr. 1875-1879, 1885, 1894; Calana DX H).

Mrs. Calana denied ever loaning her car to her brother or anyone else and couldn't explain its presence at Prada's gas station on March 13, 1970. She was evasive about the timing of Ortega's trips to New York and denied that her sister, Naomi Lopez, lived down the street from her during the spring of 1970, claiming that she first emigrated from Cuba in 1971 (Tr. 1883, 1885-1886, 1890-1893).*

2. Ciro Calana

Ciro Calana did not testify on his own behalf. He introduced records which showed that he was employed full time during January, February and March 1970 but those records did not show the days, shift, or hours of his employment. In addition, Calana produced records that established that during April, May and June 1970 he was employed for only a very brief time period (Tr. 1854-1860; Calana DXs I and J).

3. Charles Busigo Cifre

Cifre did not testify in his own behalf. To rebut Gonzalez's testimony that one payment made by Cifre occurred in New York in July, 1970, Cifre called his brother who testified that Cifre was in Puerto Rico from the middle of June, 1970 until the beginning of August, 1970. Mr. Luis Cifre produced the June, 1970 airline ticket which Charles Cifre allegedly used on his trip to Puerto Rico and which he admitted he had received from Charles Cifre, but he did not and could not produce the return ticket which was allegedly for August, 1970 (Tr. 1924-1930, 1931-1932; Cifre DXs N and O).

* The Government's theory was that the heroin not stored at the Calana's home may have been stored at the nearby home of Ortega's other sister.

4. Hector Echevarria

Echevarria did not testify in his own behalf. He called Mrs. Carlos Tapanes, who testified that Rodriguez gave the bail bondsman the money to release her husband. She admitted that she didn't know whether Rodriguez had learned of the bail bondsman from Echevarria (Tr. 1899-1902, 1904; DXs K and L).

Echevarria called three prisoners who each testified that Gonzalez and/or Rodriguez had attempted to induce him to cooperate with the Government even if it meant giving false testimony, and that Gonzalez and/or Rodriguez asserted that that was the path they were following to help themselves (Tr. 1940-1945, 1952-1957, 1967-1970).

Government's Rebuttal Case

In rebuttal the Government established that Francisca Calana testified falsely when she stated (1) that her son was at school every day from March to June 1970 and (2) that her sister had not come to the United States from Cuba until 1971 (Tr. 1993-1998, 2006; GGX 32).

The Government also called the attorney who represented one of the prisoners, Aramis Fernandez, called by Echevarria. Fernandez had testified that in a brief conversation with Miguel Rodriguez held in the presence of Fernandez' attorney, Rodriguez tried to persuade Fernandez to cooperate with the Government and to testify falsely if necessary. Fernandez asserted that he had told his lawyer, who did not understand the conversation which was held in Spanish, that Rodriguez had asked him to lie. His attorney testified that Fernandez had not told him that (Tr. 1988-1992).

ARGUMENT

POINT I

The jury properly found a single conspiracy among the defendants and their co-conspirators to traffic in narcotics.

Four of the defendants, Cifre, Figueroa, Del Cristo and Alvarez seek reversal of their convictions on the grounds that the evidence showed multiple discrete conspiracies rather than the single conspiracy charged in the indictment, and that the trial court should have granted severances. In addition, the defendant Alvarez attacks Judge Metzner's charge on the issue of multiple conspiracies as an improper "all or nothing" charge (Alvarez App. Br. at 23-24), and the defendant Cifre attacks the charge as insufficient (Cifre App. Br. at 24). Judge Metzner's charge on multiple conspiracies was correct and, in view of the overwhelming evidence of a single, on-going conspiracy and the defendants' participation in that conspiracy, their claims are frivolous.

1. Single Conspiracy

The complaining defendants insist that *Kotteakos v. United States*, 328 U.S. 750 (1946), must govern this case, urging that at most the proof as to each of them simply established a separate and discrete conspiracy between a customer and his suppliers—Ortega, Gonzalez and Rodriguez. They argue that they cannot be guilty of any broader conspiracy because each was indifferent to the transactions of his fellow buyers and thus had no stake in any overall venture.

It can hardly be asserted that the evidence in this case conformed to the pattern in *Kotteakos*, in which the Government conceded that the proof showed at least eight dis-

crete and independent conspiracies. 328 U.S. at 754-755. *Kotteakos*, as this Court has held, has no applicability to narcotics conspiracies of the kind which the Government proved at this trial. *E.g.*, *United States v. Rich*, 262 F.2d 415 (2d Cir. 1959). Nor can it be argued that the evidence in this case raised the problem, suggested in *United States v. Borelli*, 336 F.2d 376, 383 and n. 2 (2d Cir. 1964), *cert. denied* as *Cinquegrano v. United States*, 379 U.S. 960 (1965), whether persons at the extreme end of a chain conspiracy adopt the attributes of participants in a "spoke" conspiracy, since the complaining defendants here are large scale wholesaler-retailers of heroin only one step removed from the core of the conspiracy. Cf. *United States v. Cirillo*, 468 F.2d 1233, 1238 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

The structure of this conspiracy was essentially not very different from the archetypical "chain" conspiracy with links connecting the co-conspirators at critical points, which this Court has recognized in a host of cases. *See, e.g.*, *United States v. Sisca*, Dkt. No. 73-2017 (2d Cir., May 10, 1974); *United States v. Bynum*, 485 F.2d 490 (2d Cir. 1973), *rev'd on other grounds*, — U.S. —, 42 U.S.L.W. 3652 (May 28, 1974). *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States v. Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States v. Bruno*, 105 F.2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939); *see generally* Note, *Federal Treatment of Multiple Conspiracies*, 57 Colum. L. Rev. 387, 388-393 (1957). Ortega, a large-scale wholesale supplier of narcotics employed workers like his sister, his brother-in-law Ciro Calana, Gonzalez and Rodriguez to prepare the narcotics and used Gonzalez and Rodriguez as his major distributors who searched for customers and then handled the details of delivery of and payment for the narcotics. These customers were not lower-level narcotics dealers but were

themselves high level multi-kilogram narcotics wholesaler-retailers.* Each of them could not but have been aware that he was participating in a scheme in which there were many purchasers from the core group, *United States v. Borelli*, *supra*, 336 F.2d at 383 n. 2, and this knowledge, coupled with each defendant's activities, was sufficient to permit the jury to find, under the proper instructions (see *infra*, pp. 35-38), that the defendants were involved in a single conspiracy. *United States v. Capra*, Dkt. No. 74-1037 (2d Cir., July 26, 1974), slip op. at 5008-5009;** *United States v. Arroyo*, 494 F.2d 1316, 1319 (2d Cir. 1974); *United States v. Bynum*, *supra*; *United States v. Cirillo*, *supra*; *United States v. Calabro*, 467 F.2d 973, 982-83 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied as* *Mirra v. United States*, 375 U.S. 940 (1963); *United States v. Agueci*, *supra*; *United States v. Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied*, as *Genovese v. United States*, 362 U.S. 974 (1960); *United States v. Rich*, *supra*; *United States v. Tramaglino*, 197 F.2d 928 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952); *United States v. Bruno*, *supra*. As this Court recently held in *United States v. Arroyo*, *supra*, 494 F.2d at 1319:

"[I]t has often been recognized especially where heroin is involved, that it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy." ***

* Not only did each defendant buy a minimum quantity of ½ kilogram, but the heroin which they purchased was of an incredibly high purity and could thus be cut to produce many more kilos of high purity heroin.

** The complaining defendants are in no different position from the defendants Morris and Harris in *United States v. Capra*, *supra*, slip op. at 4986-4989, two unacquainted customers indicted together with their common sources of supply.

*** Cifre's argument, for example, that his interests were in conflict with his suppliers' interests and unrelated to the interests [Footnote continued on following page]

Clearly, each of the defendants cannot reasonably disclaim knowledge of and participation in a large-scale scheme designed to place narcotics in the hands of ultimate users. *United States v. Rich*, *supra*, 262 F.2d at 418.

Moreover, in this case there was direct proof that each of the complaining defendants knew that he was a member of a large and continuing illicit scheme in which there were many purchasers from the core group. See *United States v. Salazar*, 485 F.2d 1272, 1276-1277 (2d Cir. 1973). Many of the defendants (Armando Alvarez, Del Cristo, Figueroa, Cifre, Otero, Echevarria, Sarria, Ramirez, Perez) sought out the distributors, having heard of the availability of a large quantity of heroin; many of the defendants (Infesta, Reyes, Cifre, Del Cristo, Alvarez, Figueroa, Sarria, Ramirez, Lopez) bought on more than one occasion, manifesting their awareness of the availability of a large quantity of drugs being distributed as an on-going enterprise; and finally, many of the defendants were shown to have had specific knowledge of purchases by other customers—Cifre knew about purchases by Prada and Echevarria; Del Cristo knew about Roberto Lopez and Echevarria; Figueroa knew about Infesta, Reyes and Ramirez.

In sum, the evidence established a single conspiracy which contemplated the commission of numerous narcotics crimes during the eight month conspiratorial period. The proof was unambiguous as to the scope of the conspiracy, which was to distribute one 45 kilogram shipment of heroin

of other buyers (Cifre App. Br. at 11-14, 18-21), was obviously rejected by the jury and was moreover hardly persuasive in view of the evidence that he offered to guarantee Echevarria's debt to the suppliers. Cifre's contention that because Echevarria was acquitted, this Court may not properly consider the substance of the testimony regarding Cifre's activities with Echevarria, must be rejected. See, e.g., *United States v. Sisca*, *supra*, slip op. at 3426 and n. 9; cf. *United States v. Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967).

for enormous profit. *United States v. Guanti*, 421 F.2d 792, 801 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970). Its common aim and "ultimate purpose [was] the placing of the forbidden commodity into the hands of ultimate purchasers." *United States v. Agueci*, *supra*, 310 F.2d at 826. The issue whether the single conspiracy alleged in the indictment had been proved or whether the evidence showed several separate and independent conspiracies was placed squarely before the jury. By their verdict, the jury found that a single conspiracy had been proved. Since the evidence overwhelmingly supported that finding and since the trial court's instructions on this subject were correct, the verdict on this count must stand.

2. Severance

In view of the evidence establishing the existence of a single conspiracy, the refusal of the trial court to grant severances to the complaining defendants was proper. *United States v. Bynum*, *supra*, 485 F.2d at 497; *United States v. Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

The general rule is, of course, "... that persons jointly indicted should be tried together ... where the indictment charges ... a crime which may be proved against all the defendants by the same evidence and which results from the same or a similar series of acts." *United States v. Kahaner*, 203 F. Supp. 78, 80-81 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). Moreover, "[a] defendant is not entitled to a severance merely because the evidence against a co-defendant is more damaging than the evidence against him." *United States v. De LaRosa*, 450 F.2d 1057, 1065 (3d Cir. 1971), *cert. denied sub nom. Jones v. United States*, 405 U.S. 957 (1972).

"Trial judges possess broad discretion in granting motions to sever pursuant to Fed. R. Crim. P. 14 . . ." *United States v. Cassino*, 467 F.2d 610, 622 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). The established rule in this Circuit is that a defendant "must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one, and that a trial court's refusal to grant a severance will rarely be disturbed on review.'" *United States v. Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972), *quoting United States v. Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971).

None of the examples of alleged prejudice cited by the defendants—either individually or collectively—demonstrate that the trial court abused its discretion in denying their requests for separate trials.*

* These insufficient claims include: (1) length of the trial and the volume of evidence (see *United States v. Stromberg*, *supra*; *United States v. Aviles*, *supra*); (2) limited involvement in the conspiracy (see *United States v. Capra*, *supra*, slip op. at 5008-5009; *United States v. Vega*, 458 F.2d 1234 (2d Cir. 1972), *cert. denied as Guridi v. United States*, 410 U.S. 982 (1973); *United States v. Bynum*, *supra*); (3) proof of other crimes during the course of the conspiracy (*United States v. Bynum*, *supra*); (4) the criminal record of certain co-defendants (*Glass v. United States*, 351 F.2d 678, 680 (10th Cir. 1965); *United States v. Stracuzzi*, 158 F. Supp. 522 (S.D.N.Y. 1958), *aff'd as United States v. Schaffer*, 266 F.2d 435 (2d Cir. 1959), *aff'd*, 362 U.S. 511 (1960)); (5) conflicting or antagonistic defenses among the defendants (*United States v. Hurt*, 476 F.2d 1164 (D.C. Cir. 1973)); (6) the outbursts of co-defendants during the trial (*United States v. Bentvena*, *supra*). Indeed, scarcely any of the alleged prejudices occurred during this trial. The only allegation made specific is a claim by the defendant Figueroa that Echevarria transformed the trial into a "Cuban gangster trial". Figueroa App. Br. at 7. This claim is factually baseless.

3. The Charge

Alvarez claims for the first time on appeal that the trial court delivered the all-or-nothing conspiracy charge disapproved in this Circuit since *United States v. Borelli*, *supra*, 336 F.2d at 385, and *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 385 U.S. 947 (1966). The claim is without merit.

Borelli teaches that "where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on that issue rather than allow it to decide on all or nothing basis as to all defendants." 336 F.2d at 386 n. 4. *Kelly* requires that the jury clearly recognize the difference between the evidence against each defendant. 349 F.2d at 757. The instructions to the jury in this case unquestionably conformed to these principles.*

* *Borelli* by its own terms is carefully limited and designed to avoid its rote and talismanic invocation in each and every conspiracy case. As Judge Friendly noted in *Borelli*, "[b]y no means every conspiracy trial will raise the problem here considered. Often the defendant's acts will have not have the ambiguity with respect to the inference of agreement . . .; even in cases where some ambiguity exists, the precise scope of his agreement will not always be sufficiently important that the judge would be required to stress it in his charge . . ." 336 F.2d at 385-86. Here, of course, it can hardly be argued that Alvarez was a peripheral defendant or that any ambiguity clouds the question of his membership in the conspiracy. Moreover, while *Kelly* requires that the jury clearly recognize the difference between the evidence against each defendant, 349 F.2d at 757, that was a case in which a marginal defendant, against whom the Government's proof was weak, was caught up in a net of entangling and overwhelming evidence offered against clearly culpable co-conspirators, 349 F.2d at 758-59. That is not the pattern that emerged in this case. But in any event, despite the marked differences between this case, on the one hand, and *Borelli* and *Kelly* on the other, the trial judge's charge still conformed strictly to the mandate of *Borelli* and *Kelly*.

First, Judge Metzner carefully marshalled the evidence as to each defendant (Tr. 2368-2381). Second, the issue whether a single conspiracy had been proved, as the Government contended, or whether there were several separate or independent conspiracies, as the defendants contended, was placed squarely before the jury. The jury was instructed that: "Proof of several separate and independent conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of those conspiracies proved is the single conspiracy charged in the indictment" (Tr. 2354); and that, if they did not find that the conspiracy charged in the indictment existed, the jury had to acquit all of the defendants on Count One (Tr. 2354-2355). They were further instructed that, if they did find that a single conspiracy had been proven, they were required to determine membership on an individual basis by focusing on each defendant separately and/or the scope of his agreement.*

* "If you satisfy yourselves beyond a reasonable doubt that the conspiracy as alleged in the indictment existed, then you must determine as to each defendant as to whether he or she knowingly and wilfully was an active participant in the unlawful plan with the intention of furthering its objectives. Mere knowledge of an illegal act on the part of some other alleged co-conspirator is not sufficient. Merely acting in a way which incidentally furthers the purpose of the conspiracy without knowledge that a conspiracy exists does not make a person a member of the conspiracy" (Tr. 2355-2356).

"In order for you to find that a particular defendant was a member of the conspiracy charged in the indictment, you must find that that defendant knew what its unlawful purpose was and that he had a stake or personal interest in it as distinguished from acting exclusively on his own. The scope of each defendant's agreement must be determined individually from what was proved as to that defendant."

"In order for a defendant to be held for joining others in a conspiracy, he must in some sense promote their venture himself or make it his own" (Tr. 2357).

[Footnote continued on following page]

After placing the issue in this context the Court concluded its instructions on the existence of a conspiracy as follows:

"If after considering each defendant separately you find that he is not a member of the conspiracy alleged in the indictment or is a member of some other conspiracy than the one alleged in the indictment then you should acquit that particular defendant in Count 1" (Tr. 2360).

These instructions were proper. *United States v. Calabro*, 449 F.2d 885, 894 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

"Now, a single act of a defendant, such as a purchase of heroin from a member of a conspiracy, may be sufficient to draw that defendant within the ambit of the conspiracy. However, since conviction for conspiracy requires an intent to participate in the unlawful enterprise, the single act itself must be such that you may reasonably infer from it such an intent, or there must be independent evidence tending to prove that a defendant had some knowledge of the broader conspiracy beyond his single act."

"You may consider the quantity of heroin purchased, its cost and the circumstances under which the purchase was made as bearing on a defendant's intent to participate in the conspiracy. You may find from such facts that the conspirators at one end knew business could not stop with their buyers and that the conspirators at the other end knew it did not begin with their sellers."

"Such facts may prove that each level of operation depended upon the existence of the other, and the mutual interdependence of each level was fully understood and appreciated by the defendant."

"I want to caution you, however, that mere association with one or more of the alleged conspirators does not make one a member of the conspiracy. Nor is knowledge without participation sufficient to make one a conspirator" (Tr. 2358-2359).

In view of the above, Cifre's cryptic complaint about the trial court's charge must fail (Cifre App. Br. at 24).

Judge Metzner then emphasized to the jury that each defendant was entitled to individual consideration and carefully underscored the fact that the jury could "... find that none of the defendants, or some of the defendants, or all of the defendants, on trial were members of a single conspiracy alleged in the indictment" (Tr. 2360). This is hardly an "all or nothing" charge. *United States v. Guanti*, 421 F.2d 792, 800 (2d Cir.), cert. denied, 400 U.S. 832 (1970).

In view of the fact that in *Bynum* this Court approved virtually the same charge given by Judge Pollack and rejected the same arguments presented here, 485 F.2d at 497-498, it is submitted that the contention that the charge was prejudicial and in violation of *Borelli* and *Kelly* is insupportable.* Moreover, it is clear that the jury carefully followed these instructions because during their deliberations they requested a reading of the testimony concerning Calana, Infiesta, Cifre, Del Cristo, Otero, Echevarria, and Aguilera.

POINT II

The evidence was more than sufficient.

Calana, Figueroa, Cifre, Del Cristo and Alvarez contend that the evidence was not sufficient to warrant submitting the case against them to the jury. None of the arguments have merit.

1. Calana

Calana claims that the evidence merely showed that he was a "hospitable" brother-in-law to Ortega and failed to

* The defendant Figueroa's complaint about the "Pinkerton" charge (Figueroa App. Br. at 10-11) is incomprehensible because there was none.

establish knowing participation by him in a conspiracy. The record, however, is to the contrary, showing Calana to be an active and central member of the conspiracy. See, e.g., *United States v. Sisca*, *supra*, slip op. at 3423-3424. See also *United States v. Vasquez*, 429 F.2d 615, 617-618 (2d Cir. 1970).

Not only did Ciro Calana willingly store over 20 kilos of heroin in his house but he actively participated in numerous cutting sessions in his house in which heroin was diluted with milk sugar. In addition, after the 20 kilos stashed in his house were distributed, he brought more heroin into the house from the balance of the heroin which was stored somewhere nearby. Together with Ortega, Calana transported 20 kilos of the heroin to New York for Caramian, was present at the cutting and mixing session in Infesta's apartment, and on one occasion when Ortega delivered heroin to one of his customers Calana collected money for Ortega from Gonzalez. He and his wife received \$1,000 per kilo from Ortega for their various services.

Calana's contention that there was insufficient evidence of his *constructive possession* of heroin to warrant a jury finding that he had the requisite knowledge that the heroin was imported is, to say the least, bizarre.* The Government relied on and established *actual possession* by ample evidence.

* Calana's assertions that "whether [Calana] knew his brother-in-law or his friends engaged in criminal activities would be conjecture and surmise" Calana App. Br. at 7-8, that "during the course of the alleged conspiracy [Ortega] did not visit [Calana] or his wife" App. Br. at 9, and that "[a]ssuming that [Calana's] brother-in-law did have heroin in the suitcase, it does not follow that [Calana] knew . . ." App. Br. at 9-10, are wholly insupportable.

2. Figueroa

Figueroa claims that the evidence merely established that he was a "minor" purchaser of heroin from Gonzalez and Rodriguez and not a member of any overall conspiracy. This claim is frivolous.

Figueroa's purchase of a total of 6½ kilograms of heroin from the core conspirators on six separate occasions in a relatively short period was in and of itself evidence of his awareness of the existence of a large on-going conspiracy to distribute heroin. Moreover, Figueroa knew that Ortega, Gonzalez and Rodriguez had sold heroin to Infesta, Reyes and Ramirez, and indeed he himself had purchased some of that heroin from Infesta and Reyes. This was clearly sufficient evidence from which the jury could find that Figueroa was a member of an overall conspiracy and had a stake in the venture (See Point I, *supra*).

Figueroa also contends that the evidence was insufficient to support his conviction on Count Eleven for trafficking in 6½ kilograms of heroin during the months of March and/or April 1970, because his pick-up man for one kilo, Rigoberto Rosal Rodriguez, was acquitted. The evidence showed that Figueroa ordered (and paid for) a third kilo of heroin and directed Rodriguez to deliver it to Rosal Rodriguez at Prada's gas station. Judge Metzner dismissed the indictment against Rosal Rodriguez because of the isolated transaction rule and because he found insufficient proof that Rosal Rodriguez knew he was carrying heroin as opposed to some other substance. That dismissal did not alter Figueroa's knowledge that what his man was receiving for him was heroin, and the evidence was clearly sufficient that Figueroa purchased and facilitated the transportation of that and the other 5½ kilos. Cf. *United States v. Sisco*, *supra*, slip. op. at 3426 and n. 9; *United States v. Carbone*, *supra*. The claim is legally inadequate. E.g., *United States v. Brown*, 483 F.2d 88, 92 (3d Cir. 1973) (*en banc*).

3. Charles Busigo Cifre

Cifre argues that the evidence was insufficient to convict him of a conspiracy with other retailers and supported only an uncharged narrow conspiracy between him and his supplier-wholesaler. In this connection he invokes the isolated transaction rule. He also contends that his acquittal on Count Five, the substantive count, was inconsistent with and requires reversal of his conviction of conspiracy. These contentions are meritless.

Cifre told Gonzalez that he was going to buy a large quantity of the heroin Gonzalez had available. In fact he purchased two ½ kilos on two separate occasions. His knowledge of the existence of the large shipment and two purchases were clearly sufficient to permit the inference that Cifre knew he was part of a larger conspiracy, encompassing other wholesaler-retailers. In addition, the Government established Cifre's involvement in the ½ kilo transaction with Echevarria and his purchase of ¼ kilo of this heroin from Prada. Cifre's contention that the evidence did not link his activities to those of his fellow wholesaler-retailers was obviously rejected by the jury.* There is thus simply no basis on this record for applying the single transaction rule to exonerate Cifre.**

* As already indicated, Judge Metzner's charge very carefully focused on the question of each defendant's stake in the venture, see, *supra*, note at p. 36.

** A single act or isolated transaction may not be sufficient to draw a defendant within the ambit of a large conspiracy:

"For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotic laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred."

United States v. DeNoia, 451 F.2d 979, 981 (2d Cir. 1971). See also *United States v. Bentvena*, *supra*, 319 F.2d at 927-28; *United States v. Agueci*, *supra*; *United States v. Aviles*, *supra*. Judge Metzner so charged the jury, see *supra*, note at p. 37. This rule is simply inapplicable to Cifre.

Cifre's contentions that the jury's verdict of guilt on the conspiracy count must be overturned because the jury acquitted him of the substantive offense charged in Count Five is frivolous. It is well settled, as Cifre concedes, that inconsistent verdicts are the jury's prerogative and will not be disturbed. *Dunn v. United States*, 284 U.S. 390 (1932); *United States v. Zane*, 495 F.2d 683, 689-692 (2d Cir. 1974); *United States v. Handel*, 464 F.2d 679 (2d Cir.), *cert. denied*, 409 U.S. 984 (1972).*

Nevertheless, Cifre argues that the rule in *Dunn* has been eroded by the doctrine of collateral estoppel enunciated in *Ashe v. Swenson*, 397 U.S. 436 (1970). In essence Cifre contends that had he been tried separately on the substantive count and acquitted, a later trial on the conspiracy count would have been barred by collateral estoppel under *Ashe*. Accordingly, he charges that a single trial of both counts in one indictment constitutes prejudicial joinder and denies him due process.**

The identical claims, however, have recently been rejected by this Court in *United States v. Zane*, *supra*. There the Court said:

"it is equally clear that the principle of *res judicata* . . . in the setting of *separate* prosecutions has no

* Recognizing the continued vitality of the *Dunn* rule, Cifre prefers to call the verdicts in his case "repugnant" and defines such a verdict as "one where there has been a finding of guilt on one but not the other of the two crimes charged in the indictment, each of which has identical elements. . . ." Since the two counts in question here clearly charge separate crimes, one a conspiracy to violate the narcotics laws, and the other charging the substantive offense, with different elements of proof required for each, it is plainly incorrect to call the verdicts "repugnant", even under Cifre's definition.

** Needless to say, Cifre never moved at the trial level for a severance of the charges against him into two separate trials.

application to the inconsistent verdicts on counts tried together under a single indictment." 495 F.2d at 690 (emphasis in original).

Moreover, the notion that after an acquittal on the substantive count the Government would have been barred from prosecuting Cifre on the conspiracy count is plainly incorrect. Retrial would be barred only if the prior acquittal on the substantive count constituted a necessary determination favorable to Cifre of the facts essential to the conspiracy offense. *United States v. Zane*, *supra*, 495 F.2d at 691 and n. 5; *Sealfon v. United States*, 332 U.S. 575, 579 (1948); *United States v. Kramer*, 289 F.2d 999 (2d Cir. 1961). Here, as in *Zane*, the verdicts were not necessarily inconsistent, in that the acquittal on one count did not necessarily determine in a manner favorable to the defendant facts to be proved on the second count. Cifre had been charged in the substantive count with engaging in two narcotics transactions, each involving one-half kilo of heroin. Judge Metzner charged the jury that to convict Cifre on the substantive count they must find guilt beyond a reasonable doubt with respect to both transactions (Tr. 2390). The jury could, therefore, have acquitted on the substantive count because they could agree on only one transaction, and still have convicted Cifre of the charged conspiracy in Count One. See generally *United States v. Tramunti*, Dkt. No. 74-1398 (2d Cir., July 12, 1974), slip op. at 4829-4835; *United States v. Gugliaro*, Dkt. No. 74-1378 (2d Cir., July 19, 1974), slip op. at 4880-4883.

4. Domingo Del Cristo

Del Cristo argues that: 1) the non-hearsay evidence against him was insufficient to allow submission of both counts against him to the jury; 2) his transactions were insufficient to sustain an inference of his knowledge of a broader conspiracy; and 3) the Government failed to adequately establish his constructive possession of the heroin. These contentions are without merit.

In arguing that the non-hearsay evidence against him was insufficient, Del Cristo apparently relies on the theory that contradictory evidence cancels itself out and must be discounted (Del Cristo App. Br. at 20). This is not the law. It is for the jury to pick and choose which parts of the witnesses' testimony it accepts or rejects and to resolve all conflicts, and all there need be is sufficient evidence in all the testimony to convict. See, *United States v. Zanjardino*, 496 F.2d 887 (2d Cir. 1974); *United States v. Stone*, 487 F.2d 511, 512 (6th Cir. 1973); *United States v. Hill*, 449 F.2d 743 n. 3 (3d Cir. 1971); *United States v. Barber*, 442 F.2d 517, 522-23 (3d Cir.), cert. denied, 404 U.S. 958 (1971); *United States v. Huff*, 442 F.2d 885 (D.C. Cir. 1971); *United States v. Rawls*, 421 F.2d 1285 (5th Cir. 1970); *United States v. Tropiano*, 418 F.2d 1069, 1074 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); *Smith v. United States*, 407 F.2d 356, 358 (8th Cir.), cert. denied, 395 U.S. 966 (1969); *United States ex rel Anderson v. Fay*, 394 F.2d 109, 110 (2d Cir. 1968); *United States v. Buckley*, 379 F.2d 424, 426 (7th Cir.), cert. denied, 389 U.S. 929 (1967). This is but a logical corollary of the principle that on appeal the evidence must be viewed in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Thus, while Rodriguez did not recall delivering any heroin to Del Cristo (although he recalled Del Cristo wanted to buy some heroin and that he collected money from Del Cristo), Gonzalez testified that Del Cristo ordered the first ½ kilo on credit and that he saw Rodriguez deliver it to Del Cristo. None of this testimony was hearsay, and in and of itself it satisfied the *Geaney* test. *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). See, e.g., *United States v. D'Amato*, 493 F.2d 359 (2d Cir. 1974); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973); *United States v. Ruiz*, 477 F.2d 918 (2d Cir.), cert. denied, 414 U.S. 1004 (1973);

United States v. Cafaro, 455 F.2d 323 (2d Cir.), cert. denied as *Schulman v. United States*, 406 U.S. 918 (1972). Likewise, Gonzalez's testimony that, in front of Del Cristo, Ortega authorized Rodriguez to deliver another ½ kilo of heroin to Del Cristo was not hearsay. *United States v. D'Amato*, 493 F.2d 359, 364 (2d Cir. 1974).

As to Del Cristo's "single transaction" claim, in addition to the testimony regarding Del Cristo's two purchases (which included testimony that he had heard about the large shipment), there was evidence that Del Cristo told Rodriguez to see Echevarria, who then ordered ½ kilo, and that Roberto Lopez, who was Del Cristo's partner, paid \$1800 for Del Cristo's first purchase. Lopez himself bought three ½ kilos from Rodriguez. Furthermore, Del Cristo hung around Prada's garage, the hub of the conspiracy, and around the bars which were major meeting places for the conspirators.* In sum, there was sufficient evidence to find Del Cristo had knowledge of a broad conspiracy.

Del Cristo's contention that the government failed to show his *constructive possession* of the heroin is erroneous. Gonzalez' testimony that he saw Rodriguez deliver the first ½ kilo to Del Cristo establishes *actual possession*. Del Cristo's ordering of the second ½ kilo and the statements of Ortega and Rodriguez made in furtherance of the conspiracy that they had delivered the second ½ kilo to Del Cristo, was sufficient circumstantial evidence to estab-

* Nor did the jury have to ignore the fact that Del Cristo lied at the time of his arrest when he denied knowing Ortega and claimed he could prove his innocence because he had been in the hospital in March and April 1970. These facts, elicited as Del Cristo's cross-examination, may be considered in determining the sufficiency of the evidence against Del Cristo. *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 n. 7 (2d Cir. 1973).

lish actual possession. See *United States v. Taylor*, 464 F.2d 240, 244 (2d Cir. 1972).*

* Del Cristo urges this Court to reverse his conviction after trial on the ground that the evidence presented before the Grand Jury was insufficient to support the charge against him. The claim is without merit. It is well settled, and recently reiterated by the Supreme Court, that except in extraordinary circumstances not here present, "the validity of an indictment is not affected by the character of the evidence considered . . . [and] an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate . . . evidence." *United States v. Calandra*, 414 U.S. 338, 344-45 (1974); accord, *Lawn v. United States*, 355 U.S. 329, 349-50 (1958); *Costello v. United States*, 350 U.S. 359, 363 (1956); *United States v. Marshall*, 471 F.2d 1051, 1053 (D.C. Cir. 1972); *United States v. Ramsey*, 315 F.2d 199, 199-200 (2d Cir.), cert. denied, 375 U.S. 883 (1963); *United States v. Gibson*, 310 F.2d 79, 82 (2d Cir. 1962); *United States v. Grosso*, 358 F.2d 154, 168 (3d Cir. 1966), rev'd on other grounds, 390 U.S. 62 (1968); *United States v. Callahan*, 300 F. Supp. 519, 523 (S.D.N.Y. 1969); *Paroutian v. United States*, 297 F. Supp. 137, 139 (E.D.N.Y. 1968), rev'd on other grounds, 471 F.2d 289 (2d Cir. 1972); *United States v. Garcia*, 272 F. Supp. 286, 288 (S.D.N.Y. 1967) (Mansfield, J.). The Grand Jury that returned the indictment in this case was neither affirmatively "misled", *United States v. Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972), nor "deceived" as to the nature of the evidence presented to it, *United States v. Payton*, 363 F.2d 996, 1000 and n. 1 (2d Cir.) (dissenting opinion), cert. denied, 385 U.S. 993 (1966); cf. *United States v. Estepa*, supra, 471 F.2d at 1137. In any event, Del Cristo's claim, raised here for the first time, fails on the merits as well inasmuch as the complete account of the grand jury proceedings with respect to Del Cristo, placed in its proper context, indicates that sufficient evidence was before the grand jury to support the indictment:

"Q. During the following weeks while you distributed this heroin. . . .

* * * * *

Q. Do you estimate that you cut 45 kilo to about 56 kilo during this entire time period? A. Well, the way we did it is that we had a book such as the interpreter has and we would keep a record of how much drugs we would

[Footnote continued on following page]

5. Armando Alvarez

The defendant Alvarez invokes the isolated transaction rule in contending that the evidence against him was insufficient to support his knowledge of and participation in a broad conspiracy and also argues that the trial court should have directed a verdict of acquittal in his favor because of the contradictions in the evidence. Both claims are frivolous.

Alvarez (El Chino's) purchase of a total of six kilograms of heroin on four separate occasions was more than sufficient to charge him with knowledge of and participation in an overall conspiracy. See cases cited, *supra*, at page 31. Moreover, the direct proof showed that he had heard about the shipment of heroin from others.

Alvarez' contention that the trial court should have directed a verdict of acquittal on Count Eight, the sub-

put into each delivery we made and we would cut it with some of the milk for babies, lactose is 60-20, and we would add about 7 ounces to each kilo; anywhere from between 7 and 9 ounces to each kilo, and then at the end of the whole thing we had more or less around 56 kilos.

Q. Did you arrange to sell half a kilo of heroin to Domingo Del Cristo? A. Yes.

Q. And was that arrangement made at the Gallo de Maron Bar? A. Yes.

Q. And did you arrange to sell another half a kilo after that? A. Yes, but it was Raul that authorized that.

* * * * *

Q. Is it your recollection that *all of these transactions* took place during March and April and possibly May of 1970? A. Yes . . ." (Gonzalez Grand Jury Testimony, GX 3502 at 4, 23) (emphasis added).

From the testimony, it is clear that the "arrangements" to which Gonzalez testified were completed narcotics transactions and were so understood by the grand jury. Viewed in the proper context, there was sufficient evidence before the Grand Jury to support the indictment.

stantive count, because of contradictions in the testimony of Gonzalez and Rodriguez is meritless,* for there was sufficient evidence of each of the four transactions comprising that Count. See *supra*, pp. 22-24).**

* The contradictions were not as blatant as Alvarez claims. The testimony of Gonzalez and Rodriguez was consistent on the negotiations and delivery of the first kilo although they differed as to where the negotiations took place and how payment was made. Gonzalez alone testified about the second two deliveries because Rodriguez was not present when they were made. Both Gonzalez and Rodriguez testified about the last delivery made on 158th St. and Broadway, although they differed as to the amount (1½ versus 2 kilos) and who was present.

** After the Government rested its case, Alvarez and some of the other defendants moved for the first time to dismiss the substantive counts against them on the ground that one count charging a defendant with more than one purchase of heroin was duplicitous. The Court denied the motions, finding that the defendants had waived this objection when they failed to make it before trial, having been apprised of the facts in the Government's Bill of Particulars. *United States v. Kelley*, 395 F.2d 727, 729-30 (2d Cir.), *cert. denied*, 393 U.S. 963 (1968); *United States v. Galgano*, 281 F.2d 908 (2d Cir.), *cert. denied*, 366 U.S. 960 (1961). See Federal Rules of Criminal Procedure, 12(b) (2). Furthermore, under the facts of this case it was appropriate to charge a defendant in one count with several transactions. Cf. *United States v. Cohen*, 35 F.R.D. 227 (N.D. Cal. 1964), *aff'd.*, 378 F.2d 751 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967); *United States v. Daley*, 454 F.2d 505, 509 (1st Cir. 1972); *United States v. Saporta*, 270 F. Supp. 183 (E.D.N.Y. 1967); *United States v. Goodman*, 285 F.2d 378 (5th Cir. 1960), *cert. denied*, 366 U.S. 930 (1961). Judge Metzner charged the jury that they had to find the defendant guilty of all the transactions collected in a single substantive count before they could convict on that count.

POINT III

1. The Government's use of a chart in its opening statement was proper.

Alvarez argues that references to a pictorial chart used by the Government during its opening statement so prejudiced him as to deny him a fair trial. The claim is frivolous.

The chart consisted of nothing more than three columns of names. Column I listed names of suppliers of narcotics; Column II listed names of distributors; Column III listed names of customers. On the chart, the names of the defendants on trial appeared in red; other co-conspirators, indicted and unindicted, appeared in blue.

There was nothing improper about the use of the chart. The Government is permitted to outline its case for the jury in its opening statement, and the use of a simple chart which merely lists and categorizes individuals whose names will recur thereafter throughout the trial is wholly proper. The trial involved multiple defendants and numerous co-conspirators, mostly with Spanish names which even defense counsel had difficulty pronouncing. Accordingly, the Government was permitted to list the names, thereby providing the jury with a ready means of reference. Moreover, use of the chart for purposes of limited argument was also proper. Cf. *United States v. Dennis*, 183 F.2d 201, 218 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). Alvarez has offered not a single case which has disapproved the use of such charts. On the contrary, even "[t]he admission [into evidence] of charts is discretionary with the trial judge and is subject to review only on a clear showing of abuse and resulting prejudice to the opposing party", *United States v. Ellenbogen*, 365 F.2d 982, 988 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967), and the rule is the same for the use of such charts not as evidence but solely for re-

ference purposes. See *United States v. Brickey*, 426 F.2d 680, 686-87 (8th Cir.), cert. denied, 400 U.S. 828 (1970).

Under the circumstances of this case, there was no abuse of discretion by the trial court. The chart was used only during the Government's opening and closing statements and was removed from the courtroom during trial (Tr. 79-80). During the Government's opening statement, the Assistant United States Attorney said in reference to the chart:

"To the extent of trying to help you right from the start to understand this case in its general framework, we have prepared a chart for you. *This chart is not evidence*, but utilizing this chart, however, I will preview for you what the government intends to prove during this trial" (Tr. 18; emphasis added).

In view of the limited purpose for which the chart was used, and the total failure to demonstrate any resulting prejudice, the Government submits that its use was proper and wholly unobjectionable.

2. The prosecution of Figueroa was proper and not "selective".

Figueroa argues that the Government's decision to prosecute him, a self-proclaimed "buyer of . . . narcotics" (Figueroa App. Br. at 6), was so discriminatory as to deny him the equal protection of the laws, in that persons of substantially greater involvement in the conspiratorial enterprise were not proceeded against. The claim fails not only on the facts but on the law, which requires that a defendant making such a claim show ". . . (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminating

selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights." *United States v. Berrios*, Dkt. No. 74-1365 (1 Cir., August 8, 1974) slip op. at 5158-5159.*

First of all, all of the Government's witnesses were prosecuted in connection with this case or other federal narcotics violations. Before the indictment in this case was filed Manuel Noa was already serving a 17 year sentence for violating the federal narcotics laws. Moreover, he had already been cooperating extensively with the Government's investigation of large scale narcotics importers and wholesalers, and indeed his testimony had led to the convictions of Arenas, Segundo Coronel and others, in the Eastern District of New York (Tr. 732). At the time he testified in this case Noa had pending in the Southern District of Florida a motion to reduce his 17 year sentence and understood that his cooperation with the Government on all matters would be brought to the attention of the Court in Florida.

Prior to the indictment in this case Arenas had been convicted in the Eastern District of New York for a violation of the federal narcotics laws and faced a 5-year mandatory minimum to 20-year maximum sentence. Moreover he had already been indicted in the Eastern District for the importation of the 60 kilos of heroin which were the

* Although Figueroa points to no cases on this point, he does invoke the protection of the 14th Amendment. Presumably he wishes to rely on the line of cases flowing from *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) and *Zemel v. Rusk*, 381 U.S. 1 (1965), which, in holding that federal governmental action may be so discriminatory as to violate 5th Amendment due process, essentially make 14th Amendment Equal Protection binding on the federal government as well as the State. Here, however, there was no discrimination of any kind.

subject of this case. At the time of Arenas' testimony he had not yet been sentenced on the first case and in connection with the second had agreed to plead guilty to a superseding information charging him with violations of the Internal Revenue Code. He too, like Noa, was continuing to cooperate with the United States Attorney's Office in the Eastern District of New York in connection with narcotics cases involving large scale importers and domestic wholesalers of narcotics and understood that his cooperation in all matters would be brought to the attention of the sentencing judge in the Eastern District.

Rodriguez and Gonzalez both pled guilty to several narcotics violations committed during the course of this conspiracy and were both initially sentenced to 10 years imprisonment (see *supra* note at p. 6). Gonzalez' sentence was later reduced to 6 years.

In sum, Figueroa's claim that those more culpable than he* were in effect "given a free ride" is belied by the facts.

Figueroa hints that he made efforts to cooperate with the Government which were resisted by the U.S. Attorney's Office. In fact, no such offer of cooperation was ever made.** In any event, the decision whether to prosecute is committed to the discretion of the United States Attorney as an arm of the executive branch of government, *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied as *Cox v. Hanberg*, 381 U.S. 935 (1965); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967), and courts will not interfere

* Figueroa underestimates his position in the hierarchy of significant narcotics dealers. He is in truth on no lower a level than Rodriguez and Gonzalez, who were Ortega's lieutenants.

** Indeed, although it is not in the record, Figueroa refused a request by the prosecutor in this case to cooperate.

with a prosecutorial decision to seek an indictment "except on substantial claims of racial or similar discrimination." *United States v. Strutton*, 494 F.2d 686, 688 (2d Cir. 1974); cf. *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Since there is no claim here that the decision to prosecute was motivated by any racial animus or grounded upon any other "suspect" basis such as religion or national origin, the claim is without merit. See *United States v. Berrios*, *supra*; *United States v. Bland*, 472 F.2d 1329, 1336 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

3. The Court properly admitted quantities of heroin in evidence.

Figueroa raises the novel claim that real evidence of heroin sold in the course of a narcotics conspiracy is inadmissible at the trial of the indicted conspirators. At trial the Government offered evidence of two kilograms of pure heroin sold by Rodriguez and Gonzalez for Ortega to federal undercover agents on March 13 and March 21, as well as a small quantity of pure heroin given by Rodriguez and Gonzalez to the agents on March 12 as a sample in contemplation of a sale. The evidence was clearly admissible as an act in furtherance of the conspiracy, and indeed the indictment charged the sales as overt acts. Since the sale of heroin by Rodriguez and Gonzalez for Ortega was clearly "within the fair import of the conspiracy as [Figueroa] understood it," *United States v. Bynum*, *supra*, 485 F.2d at 498 (2d Cir. 1973), *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938), evidence of such heroin was admissible against all members of the conspiracy, including Figueroa.*

* This is not even a case in which it is charged that the evidence admitted at trial was unrelated to the charge in the indictment and therefore prejudicial, see *United States v. Falley*, 489 F.2d 33, 37-38 (2d Cir. 1973), nor is it a case where the evidence aroused and inflamed the "irrational passions of the

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4. The Court's marshalling of the evidence was proper.

Armando Alvarez contends that the trial court's marshalling of the evidence prejudiced his right to a fair trial. He argues that the court erred in reviewing the testimony of Government witnesses Rodriguez and Gonzalez while failing to point out contradictions between them. The claim is completely inaccurate.

Prior to reviewing the evidence, Judge Metzner instructed the jury that his intention was "to summarize the evidence which the parties claim supports their contentions. . . ." After then advising the jury that his "recollection of the facts is in no sense binding on you. It is your recollection of the evidence as you heard it recited from the witness stand that controls" (Tr. 2368), the Court proceeded to present the evidence in support of the Government's case. Thereafter, the trial judge presented the defense case which was, in essence, the contention that Rodriguez and Gonzalez had perjured themselves during the course of the proceedings. The Court, after detailing first the defense theory with respect to the witnesses' apparent motive to lie, second, the witnesses' prior criminal records, and third, alleged efforts on the part of Rodriguez and Gonzalez to induce persons to give false testimony,

jury," *United States v. Koufman*, 453 F.2d 306, 311 (2d Cir. 1971). Here the questions for the jury were whether there was a single conspiracy as charged in the indictment and whether Figueroa was a member of the conspiracy. These issues were submitted to the jury under proper instructions which included a warning by the court that the guilt of each defendant must be individually determined by his own actions and not by the acts of others. See *United States v. Bynum*, *supra*, 485 F.2d at 499. Since the jury so found, the evidence of heroin related not to other crimes by unrelated defendants but "were part and parcel of the single drug conspiracy charged in the indictment", *United States v. Bynum*, *supra*, 485 F.2d at 498, and therefore admissible.

proceeded to explore seven examples of alleged inconsistencies and contradictions in the witnesses' testimony, including alleged contradictions with respect to Alvarez (Tr. 2377-2381).

It is well settled that "[a]n appellate court reviewing such a summary [of the evidence] not only must consider it as a whole but must place it in the setting created by the jury's hearing of the evidence and the summations of counsel." *United States v. Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). When that portion of the charge relating to the evidence presented at trial is read in its entirety and considered in the context of the Court's cautionary warning that the jury's recollection controlled, it is clear that Judge Metzner was scrupulously fair in marshalling the evidence after four weeks of trial and acted well within his authority and discretion. See *United States v. Tourine*, 428 F.2d 865, 869-870 (2d Cir. 1970), *cert. denied* as *Bartman v. United States*, 400 U.S. 1020 (1971); *United States v. Dardi*, 330 F.2d 316, 330 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States v. Bentvena*, *supra*, 319 F.2d at 940 n. 14; *United States v. Kahaner*, *supra*.

5. Calana's sentence was legal.

Calana was convicted of conspiracy to violate the narcotics laws and of the substantive offense of violating such laws, pursuant to Title 21, United States Code, Sections 173 and 174, and was sentenced to six years imprisonment on each count, to run concurrently. These provisions were repealed on May 1, 1971 and replaced by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801 *et seq.* The prior law provided for a mandatory five year minimum and 20 year maximum sentence with no possibility of parole. The new law provides for no mandatory minimum sentence and a maximum 15 year sentence with possibility of parole.

Calana seems to argue, though his brief is far from clear on this point, that his sentence under the old law was improper. The Supreme Court, however, has ruled that violations of the narcotics laws occurring prior to May 1, 1971, are subject to prosecution and sentence under the old law. *Bradley v. United States*, 410 U.S. 605, 611 (1973); *Warden v. Marrero*, — U.S. —, 42 U.S.L.W. 4955 (1974). Accordingly, the sentencing proceedings in this case were valid. *United States v. Kella*, 490 F.2d 1095 (2d Cir. 1974). Since the sentences imposed here fell within the authorized statutory limits and were not based on improper considerations, they are not subject to appellate review. See *United States v. Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *United States v. Mitchell*, 392 F.2d 214 (2d Cir. 1968).

POINT IV

Ortega's conviction on this indictment was not barred by double jeopardy or due process.

Ortega contends that the double jeopardy clause operates as a bar to his conviction on this indictment as a result of his 1971 conviction on a "tax count" under 26 U.S.C. §§ 4704(a) and 7231 for the March 13, 1970 one kilo sale to the agents. There is no merit to this claim.

On April 2, 1971, Ortega was indicted in the Southern District of Florida in one count for conspiracy to traffic in heroin in violation of Title 21, United States Code, Sections 173 and 174 (*Ortega Supp. App.* 4-5). The conspiracy related to the March 13th sale of one kilo of heroin to the federal agents and the indictment specifically alleged that the conspiracy ended on or about that date.* On

* As Judge Metzner found (*Tr.* 1764-1765; Transcript of Ortega's sentence on April 29, 1974, p. 5), the Florida indictment
[Footnote continued on following page]

May 24, 1971, the Government moved to file a one count information charging Ortega with the sale of the one kilo of heroin on March 13th not in or from the original stamped package, in violation of Title 26, United States Code, Sections 4704(a) and 7237. The motion to substitute was granted, and Ortega entered a plea of guilty to the information after being promised that the prosecution would recommend to the court a maximum five-year sentence and eligibility for parole at any time. Ortega was so sentenced on the same date (Ortega App. 29-51; Ortega Supp. App. 6-8). When indicted in this case Ortega was on parole, having served 15 months in jail on the Florida sentence.

Prior to trial in this District, Ortega moved to dismiss the indictment on double jeopardy grounds, alleging that the Florida prosecution was the same in law and in fact (Ortega Amended App. 3-4). In a memorandum opinion and order filed January 22, 1974, Judge Metzner denied the motion, finding that the conspiracy count in this case was different in law and the substantive counts in this case different in law and fact. More specifically, Judge Metzner found that Ortega had never been placed in jeopardy on the conspiracy charge in Florida and consequently he denied the motion with respect to the conspiracy count, relying on well settled law permitting separate and successive prosecutions for substantive violations of law and conspiracy, e.g., *United States v. McCall*, 489 F.2d 359 (2d Cir. 1973); *United States v. Cioffi*, 487 F.2d 492 (2d Cir. 1973), cert. denied as *Cinzo v. United States*, — U.S.

ment was limited to the March 13th sale because when the indictment was filed the Government was unaware of the fact that that kilo of heroin was part of a distribution of a 45-55 kilo shipment and that Ortega's involvement went beyond his participation in the March 13th sale. Ortega's indictment in Florida was based on the testimony of co-conspirator Carlos Bana and not on the testimony of Rodriguez or Gonzalez (Ortega Supp. App. 2-3).

—, 42 U.S.L.W. 3629 (May 13, 1974); *United States v. Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States v. Kramer*, 289 F.2d 909, 913 (2d Cir. 1961). Judge Metzner denied the motion with respect to Counts Two and Three, finding that it was obvious that these substantive violations were not based on the March 13th sale to the agents * and that in addition they were based on different statutory violations (21 U.S.C. §§ 173 and 174) from the Florida prosecution (26 U.S.C. §§ 4704(a) and 7237) (Ortega's Amended App. 5-9).**

On February 20, 1974, the morning of the first day of trial, this Court denied Ortega's petition for a writ of mandamus and prohibition, filed February 19, 1974, which sought to enjoin the trial on double jeopardy grounds. *Ortega Alvarez v. Metzner*, Dkt. No. 74-1224. Annexed to the petition were the minutes of the March 24, 1971 Florida proceedings, although they had never been submitted to the trial court. Thereafter, Judge Metzner reviewed those minutes and rejected the claim that Ortega had entered a plea of guilty to the tax count "in satisfaction" of the original conspiracy indictment (Tr. 35, 70-72, 1762-1763, 1765; Ortega App. 29-51).***

* Count Two related to the transportation of 20 kilos for Caramian to Arenas' apartment. Count Three related to the sale of one kilogram of heroin to Infiesta.

** Judge Metzner denied the motions without a hearing because Ortega had not alleged that any additional facts could have been developed at a hearing which would have been relevant to the issues (Ortega Amended App. 3-4, 8).

*** Ortega persisted in claiming that if a plea was entered "in satisfaction" of the conspiracy count or the prosecutor had made a promise to Ortega about future indictments, the doctrine of double jeopardy barred a later prosecution. Judge Metzner correctly perceived that any claim based on such facts would not be grounded in the double jeopardy clause but in the Due Process clause as it applied to promises of prosecutors (Tr. 1767). On this appeal, Ortega appears to adhere to his position that the double jeopardy clause governs this issue (Ortega App. Br. at 4).

On several occasions during the trial Ortega unsuccessfully moved for dismissal on double jeopardy grounds (Tr. 1307-1311, 1478, 1509). For the first time, at the end of the Government's case, his trial counsel alluded to the possibility that in exchange for Ortega's plea the Florida prosecutor had promised Ortega that he would not be indicted for any offenses related to the superseding information, and that he was prepared to prove that through the affidavits and/or testimony of the Assistant United States Attorney and Ortega's attorney in the Florida case (Tr. 1746-1751, 2467).^{*} Judge Metzner responded that although Ortega had no double jeopardy claim, he *might* have a Due Process claim if he could establish that such promises had been made to him in Florida. The Judge denied Ortega's motion without prejudice and specifically invited him to submit affidavits on the "promise" issue (Tr. 1762-1765; 3/21/74 letter from Judge Metzner to Harvey Michelman, Esq.).^{**} Despite that invitation Ortega simply filed a

^{*} Max Kogen, counsel on this appeal, represented Ortega in the Florida case. Mr. Kogen also represented Ortega at his arraignment in this case and was to be responsible for the case through the pre-trial motion stage. At no time during his representation of Mr. Ortega in this case did Mr. Kogen allege that a prosecutorial promise had been made in Florida. Indeed, the allegation that such a promise had been made did not surface until after the trial court had denied Ortega's pre-trial Double Jeopardy motion, the Court of Appeals had denied Ortega's petition for a writ of prohibition, and Judge Metzner had repeatedly during trial denied additional double jeopardy motions. It was only after Judge Metzner specifically pointed out that the only conceivable claim Ortega had was one based on a breach of a prosecutorial promise that the existence of such a promise was first specifically alleged (Tr. 71-72, 1767-1768, 2467; Ortega's Amended App. 26). That this allegation was unfounded was established when Mr. Kogen submitted an affidavit stating that no promises were made.

^{**} "Harvey Michelman, Esq.

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memorandum of law without supporting affidavits. On April 17, 1974, the Court again denied Ortega's motion, reminding him that no hearing would be held without an affidavit alleging appropriate facts (Ortega Amended App. 26-27). On April 29, 1974 Ortega submitted his Florida attorney's affidavit (4/29/74 Sentencing Tr. at 2; Ortega Amended App. 16-17). Not unexpectedly, Kogen's affidavit and the affidavit of the Assistant United States Attorney in Florida, submitted by the Government (Ortega Amended App. 25) confirmed—and Judge Metzner found—that no promise had been made to Ortega * with regard to future related narcotics prosecutions in Florida or elsewhere (4/29/74 Sentencing Tr. at 3-4).** Finding no merit in

Dear Mr. Michelman:

You will recall that at the time the court denied your motion for a directed judgment of acquittal at the end of the government's case, it indicated it might afford your client, Mr. Ortega-Alvarez, a hearing on possible violation of his Fifth Amendment rights in the event that he was convicted by the jury.

This statement by the court was conditioned on your persuading the court that such a hearing was proper under the law. Consequently, if you desire such a hearing, will you kindly file motion papers with supporting affidavits and a brief on or before April 12, 1974, on five days' notice to the government.

Very truly yours,

Norman C. Kleinberg
Law Clerk"

* In addition, Ortega submitted his own affidavit which contradicted that of his attorney and the Assistant United States Attorney in claiming that the Government represented to him that "the conspiracy charges and all facts and circumstances contained in said charges would be forever disposed of . . ." (Ortega Amended App. 11-13).

** Judge Metzner found, and the affidavits establish, that Ortega's motive for pleading to a tax count was to eliminate the risk of a 5 year mandatory minimum he faced if convicted under 21 U.S.C. §§ 173 and 174. In addition, he received a promise that the Government would recommend a five year sentence and immediate eligibility for parole (4/29/74 sentencing Tr. at 9). Cf. *United States v. Nathan, supra*, 476 F.2d at 459 n. 8.

the assertion that such a promise was implicit in the Government's dismissal of the conspiracy indictment.* Judge Metzner again denied the motion (4/29/74 Sentencing Tr. at 3-14).**

A. Double Jeopardy

Ortega claims that the Double Jeopardy clause bars the prosecution in this District. His claim is meritless, since he was convicted in Florida of a substantive violation of Section 4704(a) of Title 26 and convicted below of substantive offenses laid under different statutes and involving different narcotics transactions and of conspiracy.

It is well settled that before the double jeopardy claim is called into play to bar a prosecution, it must be established that the prior prosecution was the same *in law and in fact*. *United States v. Kramer, supra*, 289 F.2d at 913 (2d Cir. 1961); *accord, United States v. McCall, supra; United States v. Cioffi, supra; United States v. Nathan, supra; United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *United States v. Friedland*, 391 F.2d 378, 381 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1971); *Dryden v. United States*, 403 F.2d 1008 (5th Cir. 1968); *United States v. Edwards*, 366 F.2d

* Mr. Kogen's affidavit is truly extraordinary for experienced trial counsel. While conceding that "no understanding was directly evinced from the prosecutor", he asserts that it was his understanding of the proceedings that Ortega's plea would put an end to any charges which might have emanated from the conspiracy charge and any other charges which may have occurred prior to pleading guilty on May 24, 1971 . . ." (Ortega Amended App. 17, emphasis added). That assertion, conferring blanket immunity on Ortega for all his criminal acts, is nothing short of absurd (4/29/74 Sentencing Tr. at 3-4).

** In imposing sentence Judge Metzner stated that he was sentencing Ortega to 12 instead of 15 years in order to take into account the 15 months he had already served in the Florida case (4/29/74 Sentencing Tr. at 18).

853 (2d Cir. 1966), *cert. denied* as *Jakob v. United States*, 386 U.S. 908 (1967); *United States v. Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied* as *Genovese v. United States*, 362 U.S. 974 (1960). It is equally well settled that a defendant may be punished for multiple violations of the narcotics laws arising from a single transaction, see *Gore v. United States* 357 U.S. 386 (1958), *United States v. McCall*, *supra*, *United States v. Nathan*, *supra*, and that there is no "requirement that all such violations must be tried together," *United States v. Nathan*, *supra*, 476 F.2d at 459 & n. 7; *United States v. Cioffi*, *supra*.* Thus, as here, a defendant may be prosecuted first for a substantive violation and subsequently for conspiracy to commit the substantive violation, or, even separately for different substantive violations of law arising out of the same transaction. See, e.g., *United States v. Cioffi*, *supra*; *United States v. Kramer*, 289 F.2d at 913.**

* Judge Metzner observed that even under Justice Brennan's formulation in *Ashe v. Swenson*, this prosecution would not have been barred because the Government was unaware of the broader conspiracy at the time of the Florida indictment (Tr. 1764-1765; see *infra* at p. 63).

** *United States v. Sabella*, 272 F.2d 206, 211 (2d Cir. 1959), relied upon by Ortega, is inapplicable to the case at bar. In *Sabella* the Court held that the Double Jeopardy clause prohibited a prosecution for a narcotics sale under 21 U.S.C. §§ 173 and 174 after a conviction stemming from the same narcotics sale under 26 U.S.C. § 4705(a). The Court's rationale was that although technically the two offenses each had one different element, as a practical matter the same proof could support convictions for both, because as a result of various presumptions the Government was not required to prove either unique element in order to make out a *prima facie* case. Here, on the other hand the Government could not have sustained the conspiracy with the same evidence needed to prove the order form violation charged in Florida because of "the essential difference in the nature of conspiracy and substantive offenses," *United States v. Cioffi*, *supra*, 487 F.2d at 497 n. 6. Friendly, C.J., who wrote *Sabella*). Moreover, *Sabella* is clearly inapplicable to Counts Two and Three of this indictment which are different narcotics sales from the one charged in Florida.

The facts in *United States v. Nathan, supra*, are remarkably similar to the case at bar. In *Nathan*, defendant Boulrier had been indicted in 1969 in the Southern District of Florida for conspiracy to distribute narcotics under 21 U.S.C. §§ 173 and 174. That indictment was dismissed after Boulrier pled guilty, in 1971, to a superseding information charging him with conspiracy under 18 U.S.C. § 371 to violate 26 U.S.C. § 4704(a). Boulrier was thereafter prosecuted in the Eastern District of New York on an indictment filed in 1970 charging a conspiracy under 21 U.S.C. §§ 173 and 174. This Court held that it was unnecessary to decide whether the two conspiracies were identical *in fact*, though apparently of the view that they were, since they were different *in law*, being based upon different statutory violations, with the second, unlike the first, requiring a showing of Boulrier's knowledge of illegal importation. 476 F.2d at 458-459. This case is clearly controlled by *Nathan*, since the indictment in this District required a showing of conspiracy not required by the Florida information. See also *United States v. McCall, supra*.

Recognizing that Counts Two and Three are different narcotics sales from the March 13th sale to the agents which was the subject of the Florida charge, Ortega relies as to these counts upon Mr. Justice Brennan's concurring opinion in *Abbate v. United States*, 359 U.S. 187, 196 (1959), which suggests that all violations growing out of a single transaction must be tried together. First the view expressed by Mr. Justice Brennan is not the law, *United States v. Nathan*, 476 F.2d at 459 & n. 7, *United States v. Cioffi, supra*, and, in any event, the violations charged in Counts Two and Three and the one kilo sale to the agents did not arise out of a single transaction.

In a similar vein, Ortega invokes *Petite v. United States*, 361 U.S. 529 (1960) and *Marakar v. United States*, 370 U.S. 723 (1962) to bar his conviction on all three counts, and his reliance is similarly misplaced. Those cases turned

on the policy of the Department of Justice, not the Double Jeopardy clause. Moreover, that policy, "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient orderly law enforcement," *Petite v. United States*, *supra*, 361 U.S. at 530, is not applicable to the facts of this case. As Judge Metzner found, in May, 1971, the Government was only aware of Ortega's involvement in the sale of one kilo of heroin to the federal agents and was unaware of his role as the major distributor of a 55 kilo shipment of heroin in which the one kilo was only a part (Tr. 1764-1765). Finally, the prosecution of Ortega in this District for conspiracy to distribute 55 kilos of heroin and for trafficking in 21 kilos of heroin was not a separate prosecution for "offenses arising out of a single transaction"—the March 13th one kilo sale—within the meaning of *Petite* and *Marakar*.*

B. Due Process

Having finally conceded in the proceedings below that no prosecutorial promise was made but not kept, Ortega still suggests that his Florida plea to the substantive tax offense was in "satisfaction" of the underlying Florida narcotics conspiracy indictment and that the United States Attorney's Office in the Southern District of New York was therefore barred from proceeding against him on the conspiracy charged in Count One of the indictment in this case. The claim is without merit.**

* The fact that the law has finally caught up with Ortega for the full scope of his illegal narcotics activities should evoke no sympathy for him. *Petite* and *Marakar* arose out of completely distinguishable situations.

** Even assuming *arguendo* that Ortega's due process argument required dismissal of Count One, Ortega's convictions on Count Two and Three would remain. Since he received concur-

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Here again *United States v. Nathan, supra*, is controlling. When Boulier entered a plea of guilty in the Southern District of Florida to a superseding information charging a conspiracy to violate 26 U.S.C. § 4704(a), the underlying indictment, charging conspiracy in violation of 21 U.S.C. §§ 173 and 174, was dismissed. As part of the plea bargain in Florida, Boulier had undertaken to furnish information to the Government, and the Florida prosecutor had agreed to recommend probation and to secure the dismissal of an indictment previously brought in the Eastern District of New York charging, under 21 U.S.C. §§ 173 and 174, a conspiracy which was at the very least quite similar factually to the conspiracy alleged in the Southern District of Florida indictment. Boulier failed to furnish the information sought, was sentenced to imprisonment in Florida instead of the term of probation agreed on as part of the plea bargain, and then prosecuted on the indictment in the Eastern District of New York. This Court upheld his conviction on the Eastern District indictment over a claim that the further prosecution in the Eastern District violated the Due Process clause. While, to be sure, there were apparently no promises by Ortega in Florida which were not kept, *Nathan* is nonetheless applicable here, for once the promises on both sides in *Nathan* are cancelled out, the fact remains that Boulier's plea of guilty was as much "in satisfaction" of the Florida conspiracy indictment as Ortega claims his was in this case. Nevertheless, this Court found no basis on which to foreclose the further prosecution of Boulier on the Eastern District indictment, and no different result is called for here.

rent sentences, his valid convictions on the substantive counts provide a sufficient basis upon which to affirm the judgment. *United States v. De Noia, supra*; *United States v. Tropiano*, 418 F.2d 1069, 1083 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); *United States v. Marino*, 396 F.2d 780, 781 (2d Cir. 1968).

Moreover, as already noted, the record establishes that there was no understanding at the time of Ortega's plea in Florida that the plea to the information was intended to "satisfy" the conspiracy charge in the indictment. The affidavit of the Assistant United States Attorney who handled the case establishes, as Judge Metzner found, that the plea to the substantive count was agreed to solely to enable Ortega to avoid a mandatory minimum sentence; there was no "understanding" that Ortega would never be prosecuted for the conspiracy. If the form his plea took failed to provide him with a double jeopardy bar to prosecution on a conspiracy count, though it did foreclose further substantive charges arising from the same sale, *United States v. Sabella, supra*, that was a protection which Ortega gave up for the more immediate benefits of the non-mandatory penalty provisions of the single substantive offense to which he pleaded guilty. In the absence of any express understanding that the plea should cover a charge of conspiracy, this Court should not permit Ortega to secure more than was agreed to by the Government in Florida on the basis of his unsupported and self-serving claims. *Cf. United States ex rel. Ennis v. Fitzpatrick*, 438 F.2d 1201 (2d Cir. 1971).

Moreover, it seems clear from the Florida proceedings that the intention of the parties was not what Ortega now claims that it was. The conspiracy indictment was substituted by the information on the Government's motion (Ortega App. 32, 39), and the indictment was therefore dismissed without prejudice. Dismissals of underlying indictments upon the Government's motion are governed by Rule 48(a) of the Federal Rules of Criminal Procedure,* and dismissal upon the Government's motion is

* Rule 48 Dismissal

(a) By Attorney for Government. The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

without prejudice to reindictment for the offense, unless otherwise expressly stated, 8A Moore, Federal Practice, ¶ 48.03[1], p. 48-10. *DeMarrias v. United States*, 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied*, — U.S. —, 94 S. Ct. 1570 (March 18, 1974); *United States v. Davis*, 487 F.2d 112, 118 (5th Cir. 1973), *cert. denied*, — U.S. —, 94 S. Ct. 1573 (March 18, 1974); *United States v. Chase*, 372 F.2d 453, 463-64 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); *Mann v. United States*, 304 F.2d 394 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962); *cf. United States v. DiStefano*, 464 F.2d 845, 849 (2d Cir. 1972). To be sure, reindictment is precluded when prosecution is barred by the statute of limitations, or when the dismissal is on Sixth Amendment speedy trial grounds, *cf. Hilbert v. Dooling*,* 476 F.2d 355, 361 (2d Cir.), (*en banc*), *cert. denied*, 414 U.S. 878 (1973); *Strunk v. United States*, 412 U.S. 434 (1973), or where dismissal and reprosecution give rise to a likelihood of official harassment or denial of constitutional rights, *cf. Klopfer v. North Carolina*, 386 U.S. 213 (1967). But where, as here, such special circumstances are not involved, the dismissal is clearly without prejudice.**

In addition, Ortega's claim that his prosecution on Count One should have been barred by his plea in Florida "in satisfaction" of the conspiracy indictment previously filed there is hardly persuasive on the grounds of funda-

* In *Hilbert* this Court ruled that dismissals under the Court's Rules for Prompt Disposition of Criminal Trials were intended to be with prejudice.

** Had there been an explicit promise by the prosecutor in Florida that in exchange for Ortega's plea the underlying indictment would be dismissed with prejudice, this Court would have to reach the question left open in *United States v. Nathan*, *supra*, 476 F.2d at 459, whether one prosecutor's promise can bind a prosecutor in another district. Here, however, Judge Metzner concluded that no such promise was made, either explicitly or implicitly.

mental fairness on which Ortega relies. The indictment in Florida charged Ortega with conspiracy to traffic in one kilogram of heroin. The facts were, however, that Ortega had trafficked in 55 kilos of heroin, and the charge in the Florida indictment merely referred to one small part of a conspiracy involving far more participants and far more narcotics than, as Judge Metzner found, the Government had any awareness of at the time of Ortega's plea. Even if Ortega's plea had been entered "in satisfaction" of the Florida indictment, it was certainly not entered in satisfaction of the conspiracy charged in Count One of the indictment, even though, as a technical matter, the conspiracy charged in Florida was part of the far larger one later discovered by the Government and charged in the Southern District of New York. Rather, the plea as entered clearly satisfied any substantive charge arising out of the March 13, 1970 sale, and Ortega has never been re-prosecuted for that crime.

Finally, had the Government originally charged Ortega in Florida with a violation of 26 U.S.C. § 4704(a) or a substantive violation of 21 U.S.C. §§ 173 and 174, a subsequent New York prosecution for conspiracy under 21 U.S.C. §§ 173 and 174 would not have been barred under any theory. See *e.g.*, *United States v. Nathan*, *supra*. Accordingly, under the facts of this case, the filing of an original indictment later dismissed on the Government's motion, fortuitously charging the same statutory offense (conspiracy under 21 U.S.C. §§ 173, 174), should not bar the prosecution in this case. Ortega has not pointed to any legitimate reason why due process should turn on such mechanical and happenstance grounds.

POINT V

Infiesta was not deprived of the effective assistance of counsel.

Asserting various purported failures in his attorney's performance below, Infiesta claims that he was deprived his right to the effective assistance of counsel under the Fifth and Sixth Amendments. His claim warrants no relief.

As has been repeatedly recognized, "[t]here are stringent standards to be met to show inadequacy of counsel." *United States v. Mawey*, Dkt. No. 73-1770 (2d Cir., May 28, 1974), slip op. at 3744. The ultimate question is whether the representation at trial was so poor as to have made the trial a "farce or mockery of justice" or was "shocking to the conscience of the Court." See *United States v. Sanchez*, 483 F.2d 1052, 1055-1059 (2d Cir. 1973); *United States v. Yanishefsky*, Dkt. No. 74-1117 (2d Cir., July 30, 1974), slip op. at 5056-5057; *United States ex rel. Walker v. Henderson*, 492 F.2d 1311 (2d Cir. 1974); *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1101 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973); *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233, 237 (2d Cir.), cert. denied, 404 U.S. 967 (1971); *United States ex rel. Scott v. Mancusi*, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971); *United States v. Currier*, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914 (1969); *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).^{*} In the present case, no such prejudice has been demonstrated.

^{*} There is no authority in this Circuit holding that a defendant's burden is lessened where he raises a claim of incompetency on direct appeal rather than on collateral attack. In-

[Footnote continued on following page]

Infiesta's allegations of incompetence appear to rest on three grounds: first, that O'Connor, his attorney, only met with him twice before trial; second, that O'Connor failed to cross-examine Rodriguez and Gonzalez adequately on allegedly major inconsistencies in their testimony regarding Infiesta and further failed to exploit these alleged inconsistencies in summation; third, that one remark in O'Connor's summation in effect conceded Infiesta's guilt.

Short shrift can be made of the first allegation. At his arraignment on November 2, 1973 Infiesta was represented by retained counsel who subsequently filed pre-trial motions on his behalf. Thereafter, the Court appointed John J. O'Connor to represent Infiesta because of Infiesta's inability to pay his retained counsel. Five days before trial Infiesta wrote a letter to Judge Metzner in which he claimed he had only had two conferences with O'Connor and expressed a desire for other counsel because O'Connor allegedly had expressed his belief in Infiesta's guilt (Infiesta App. 41A). On the morning of trial O'Connor denied that he had told Infiesta that he thought Infiesta was guilty, and the Court denied the application for new counsel (Infiesta App. 39A-40A).

Judge Metzner's refusal to appoint new counsel as a result of Infiesta's eleventh hour request was entirely proper and not an abuse of discretion. A defendant is not entitled to assigned counsel of his own choosing and only where assigned counsel cannot properly defend a case for

fiesta's App. Br. at 21. Perhaps less credence will be given by the courts to belated claims of incompetency but that is hardly a lessening of the burden for a claim raised on direct appeal. Indeed a defendant unschooled in the law who has the same attorney on appeal as at trial will be unaware of the existence of a viable claim of incompetence until he procures other counsel. *United States ex rel. Marcelin v. Mancusi*, *supra*, 462 F.2d at 42.

some specified reasons is the defendant entitled to new counsel. See, e.g., *United States v. Morrissey*, 461 F.2d 666 (2d Cir. 1972); *United States v. Mitchell*, 354 F.2d 767 (2d Cir. 1966); cf. *United States v. Maxey*, *supra*, slip op. at 3743; *United States ex rel. Testamark v. Vincent*, 496 F.2d 641 (2d Cir. 1974). The Court accepted O'Connor's statement that he believed in Infiesta's innocence and thus there was no reason O'Connor could not continue to effectively represent his client.*

That only two conferences between Infiesta and O'Connor were held prior to trial is no indication of lack of proper trial preparation, and it has frequently been held that the "time consumed in oral discussion . . . is not the crucial test of the effectiveness of the assistance of counsel," *United States v. Wight*, *supra*, 176 F.2d at 379; *United States ex rel. Marcelin v. Mancusi*, *supra*, 462 F.2d at 42; *United States v. Bentvena, et al.*, *supra*, 319 F.2d at 935; cf. *United States ex rel. Testamark v. Vincent*, *supra*. Furthermore, particularly under the circumstances in this case, the two conferences were in all probability more than adequate.** The only line of defense in this case, and the line adopted by all 13 defendants, was to attack the credibility of Rodriguez and Gonzalez. Conferences with Infiesta could have shed little light on this subject. That this is so is obvious from Infiesta's present

* In any event counsel's objective opinion that his client may be guilty does not render his services incompetent unless such a belief can be shown to have in some way impaired his ability to provide effective assistance of counsel. Defense counsel often represent—tenaciously and sometimes successfully—clients who have admitted their guilt. In this case it is hard to see how O'Connor could have thought Infiesta innocent if O'Connor knew the facts.

** During the February 6, 1974 pre-trial conference (14 days before trial), at least three attorneys indicated that they had not yet met with their clients to prepare for trial (counsel for defendants Ortega, the Calanas and Aguilera).

inability to allege how he was harmed or prejudiced by the limited number of conferences he had with his attorney.* Moreover, appointment of new counsel would have required either the severance of Infiesta or an adjournment of a trial of 13 defendants which had been scheduled for 3½ months.** Under these circumstances Judge Metzner properly exercised his discretion. See, e.g., *United States v. Maxey*, *supra*, slip op. at 3743-44; *Ungar v. Sarafite*, 376 U.S. 575 (1964); *United States v. Rosenthal*, 470 F.2d 837 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States ex rel. Baskerville v. Deegan*, 428 F.2d 714, 716, 717 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970); *United States v. Ellenbogen*, 365 F.2d 982 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967).

Infiesta's second allegation—that he was denied the effective assistance of counsel because O'Connor failed to exploit inconsistencies in the testimony Gonzalez and Rodriguez—must fail for both factual and legal reasons.

As a factual matter, virtually all trial counsel below adopted as their main line of defense an attack on the credibility of the Government's chief witnesses, Rodriguez and Gonzalez, who had been Ortega's lieutenants in the

* Infiesta does not allege that O'Connor failed to investigate the case, to follow leads, to pursue alibis, to do adequate legal research or to raise appropriate motions before, during or after trial. Such allegations routinely accompany claims of ineffective assistance of counsel. See, e.g., *United States v. Yanishefsky*, *supra*; *United States ex rel. Testamark v. Vincent*, *supra*; *United States v. Maxey*, *supra*, slip op. at 3744; *United States ex rel. Walker v. Henderson*, *supra*, 492 F.2d at 1313; *United States ex rel. Marcelin v. Mancusi*, *supra*, 462 F.2d at 45; *United States ex rel. Crispin v. Mancusi*, *supra*, 448 F.2d at 235-237.

** The February 20, 1974 trial date was set on November 2, 1973, after all counsel agreed upon the date and after Judge Metzner postponed a multi-defendant securities trial which had been scheduled to commence on February 20th to accommodate this trial.

distribution of the heroin. While many attorneys chose to pursue this line of defense by highlighting the conflicts in the testimony of these two accomplice witnesses * in cross-examination and summation, counsel to some of the defendants (including Infiesta) preferred the argument that Rodriguez and Gonzalez had made up and conformed their stories. That O'Connor chose to touch only lightly on the conflicts and preferred to stress the claim that the witnesses got together to fabricate and tailor their testimony was clearly a tactic "over which conscientious attorneys

* The conflicts in the testimony regarding Infiesta were far from major and none of them went to the heart of his participation in the conspiracy. Both Rodriguez and Gonzalez testified that they met Infiesta on March 12 and discussed the shipment of heroin; that they went to Infiesta's apartment on March 13th before and after the sale to the narcotics agents; that they cut heroin in Infiesta's apartment. Both also testified that Infiesta and his partner Reyes were Ortega's customers, that Ortega had told them he had sold several kilos from the shipment to Infiesta before March 12, and that Infiesta received one kilo from Ortega the day the heroin was cut in Infiesta's apartment. The conflicts in the testimony viewed against the entire testimony were not particularly significant and were easily explained by mistaken recollection by one or the other witness. The conflicts were: Gonzalez said that he and Ortega brought 7 kilos to Infiesta's apartment and that Rodriguez arrived shortly thereafter; Rodriguez said that when they began to cut the heroin Infiesta produced it from somewhere in his apartment and that the amount was 4 kilos. Gonzalez testified that those present were Ortega, Infiesta, Reyes and Rodriguez. Rodriguez testified that in addition Ciro Calana was present and that the defendant Figueroa came to the door although he did not come in; Gonzalez testified that after the cutting Ortega took 7 kilos for Arenas, and Rodriguez testified that Ortega took 3 kilos for his customer Juan Chaveco. Both however agreed that Ortega gave Infiesta one kilo and that Infiesta stashed some heroin in a car outside his apartment. (Gonzalez recalled that Infiesta stashed the kilo he had been given in the car while Rodriguez recalled that Infiesta stashed a half-kilo there which Ortega asked him to hold.)

might differ," *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963), and certainly not a "total failure to present the case of the accused in any fundamental respect," *United States ex rel. Marcelin v. Mancusi*, *supra*, 462 F.2d at 42.

Indeed, one of the strongest points in the Government's summation was the argument that the fact of so many contradictions in the testimony should persuade the jury that the two co-conspirators had to be telling the truth and did not concoct their stories.* The jury obviously accepted this argument when they convicted eight defendants. Interestingly enough, the defendants about whom the testimony was most in conflict (save Viera)—Cifre, Del Cristo and Alvarez—were convicted despite the efforts of counsel to highlight the conflicts. The claim by Infesta's counsel on appeal that the exploitation of conflicting testimony by counsel for the four acquitted defendants probably led to their acquittal is purely speculative.** Not only

* Both Rodriguez and Gonzalez readily admitted that they had spoken to each other about this case in Nassau County Jail but insisted that each had steadfastly adhered to his own recollection of the facts. That this was the case was obvious from the numerous minor conflicts in their testimony and some major ones.

** Mrs. Calana was probably acquitted because she produced work records to establish that she was not at home between 6 a.m. and 5 p.m., and because juries tend to acquit female defendants in narcotics cases. Moreover, the jury knew the Calanas had children and that a guilty verdict against both would seriously affect the family. Aguilera was probably acquitted because of the Government's failure to question any witness in the Grand Jury about his activities until January 9, 1974. This fact served as the major focus of Aguilera's cross-examination and summation and not conflicts in the testimony about Aguilera (which incidentally were very minor). The acquittal of Echevarria, who represented himself with the assistance of assigned counsel, is a mystery, in view of the fact that the testimony regarding his involvement was a good deal more consistent than the testimony regarding some of the convicted defendants.

are the reasons for the acquittals unknown but it is equally probable that only the defendant Viera was acquitted because the conflicts in the testimony regarding his participation were tremendous, while the acquittals of Echevarria, Aguilera and Mrs. Calana can be explained on other grounds.

In any event, even if Infiesta's counsel might have done better stressing the inconsistencies in the testimony of Gonzalez and Rodriguez rather than claiming that it was a tailored fabrication, it is well settled that "tactical errors or strategic miscalculations by counsel afford no constitutional grounds for relief." *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir. 1974); *accord*, *United States v. Yanishefsky*, *supra*, slip op. at 5053; *United States ex rel. Crispin v. Mancusi*, *supra*, 448 F.2d at 236; *United States v. Matalon*, 445 F.2d 1215, 1218-1219 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States v. Silva*, 418 F.2d 328, 331 (2d Cir. 1969); *United States ex rel. Maselli v. Reincke*, 383 F.2d 129, 133 n. 4 (2d Cir. 1967); *United States ex rel. Thomas v. Zelker*, 332 F. Supp. 595, 600 (S.D.N.Y. 1971). While it "may well be that another attorney would have resolved these problems differently and that [the defendant] would have profited from sounder advice" tactical errors do not amount to a denial of a fair trial unless the errors are "so outrageously incompetent as to shock the conscience of the court." *United States v. Garguilo*, *supra*, 324 F.2d at 797. The reason for this salutary rule is as follows:

"When reviewing cases charging incompetence of counsel, we are seeking to vindicate the most fundamental of rights. We are not conducting a seminar in trial procedures, at least where the tactics in-

volved are those over which conscientious attorneys might differ. If Garguilo were to be afforded a hearing on the allegations presented here, our trial appellate dockets would be swollen with incompetence of counsel cases. A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence."

United States v. Garguilo, supra, 324 F.2d at 797. Indeed, even if Infesta's counsel could be said to have committed a serious tactical error, in the context of this case there can have been no prejudice, since the fact that the testimony of Gonzalez and Rodriguez was in some respects inconsistent was exhaustively brought out in the summations of other counsel. *Cf. United States v. Weiss*, 491 F.2d 460, 469-470 (2d Cir. 1974).

Counsel's final argument, that O'Connor's summation was incompetent and that he did nothing to "present a reasonable and arguable defense to the jury" (Infesta's App. Br. 21-22) is simply not true. In summation O'Connor accused Gonzalez and Rodriguez of testifying falsely in order to gain consideration from the Government and of getting their stories together and pointed out their unsavory backgrounds. In addition he argued that the witnesses could not recall many things in response to questions on cross-examination, noted that their stories were in conflict by pointing to one specific discrepancy, and asked the jury to disregard the telephone calls from Reyes to Infesta as not probative of anything. O'Connor also very wisely pointed out that although Rodriguez and Gonzalez both testified that they went to Infesta's apartment after the sale to the agents on the evening of March 13th, the surveillance agents were unable to corroborate that

testimony (Tr. 2079-2080). That O'Connor did not sum up at great length is hardly a fault in view of the fact that his summation was preceded by those of counsel for Del Cristo, the Calanas, Echevarria and his appointed counsel, and was to be followed by six more summations including that of counsel for Ortega, who was lead counsel. All of the attacks on the credibility of Gonzalez and Rodriguez made by other counsel certainly inured to Infiesta's benefit and the repetition of arguments made by others was certainly unnecessary.*

Infiesta further argues that a remark by O'Connor in summation that he believed Rodriguez's testimony left the

* O'Connor's maintenance of a fairly low profile throughout the trial was a reasonable tactic. While Infiesta's involvement was great it was overshadowed by that of Ortega, and Infiesta benefited from the extensive cross-examination by Ortega's counsel who always cross-examined first. Indeed Judge Metzner had ruled that defense counsel would not be permitted to repeat any cross-examination already covered by their colleagues. By the time counsel for Ortega and Cifre were through with Rodriguez and Gonzalez there was little or nothing left for their colleagues. Moreover, a low profile was warranted in view of the fact that to the extent that the Government could corroborate the testimony of Rodriguez and Gonzalez against any particular defendant the corroboration against Infiesta was second only to that against Ortega. The Government proved that numerous telephone calls were made from Reyes to Infiesta during the course of the conspiracy; that Infiesta signed for a car rented under Reyes' names on March 12, 1970 and that Ortega and Gonzalez used this very car on March 16th when they met with the agents at Luigi's; and that on March 19th the day of the aborted sale of one kilo to the agents, Rodriguez and Gonzalez were observed entering and leaving Infiesta's building. In addition, numerous photographs showed that Infiesta frequented the 005 and hung around with Figueroa, Gonzalez and Rodriguez. Cf. *United States ex rel. Marcelin v. Mancusi*, *supra*, 462 F.2d at 43 n. 12; *United States ex rel. Crispin v. Mancusi*, *supra*, 448 F.2d at 234; *United States v. Matalon*, *supra*, 445 F.2d at 1217; *United States v. Katz*, 425 F.2d 928, 931 (2d Cir. 1970).

jury no choice but to convict him.* That argument disregards that fact that throughout his summation O'Connor attacked the credibility of both Rodriguez and Gonzalez and that his comment about Rodriguez's truthfulness was limited to one question and answer posed by O'Connor on cross-examination. *Cf. United States v. Yanishefsky, supra*, slip op. at 5056. In connection with Rodriguez's testimony regarding the cutting of heroin at Infiesta's apartment, O'Connor elicited that Rodriguez did not sell any heroin to Infiesta. That was of course true because Infiesta was Ortega's client and Rodriguez never sold him any heroin. O'Connor took this remark out of context, adopted it as true, and tried to twist it to Infiesta's benefit by arguing that no heroin was mixed at Infiesta's apartment. However, O'Connor persisted in maintaining that all of Rodriguez' other testimony was false. While this remark of O'Connor's was probably unwise because his distortion of the record was easily answered by the prosecutor (Tr. 2283-2284), his attempt to blunt the force of the incriminating testimony of both Rodriguez and Gonzalez can hardly be called incompetent.** As this Court said in *United States ex rel. Testamark v. Vincent, supra*, 496 F.2d at 643, sometimes "there is not too much the best defense attorney can do."

* O'Connor said:

"What about Gonzalez? He's another convicted man. He was deported. He gets up on the stand and tells different versions of different stories. He denies or doesn't remember for some 150 times or more.

"What does he say? He says that Mr. Infiesta was with him when the so-called heroin was mixed in Mr. Infiesta's apartment. What do we say? We say it is a belief. We believe Rodriguez even though Rodriguez is a convicted felon. We say that there was no happening in Infiesta's apartment whatsoever" (Tr. 2079).

** Counsel for Del Cristo also argued that the jury should believe Rodriguez because he testified that he had not delivered
[Footnote continued on following page]

In sum, Infiesta's claims taken individually and collectively do not establish incompetence of counsel. *United States v. Yanishefsky*, *supra*, slip op. at 5057; *United States ex rel. Walker v. Henderson*, 492 F.2d at 1315; *United States v. Sanchez*, 483 F.2d at 1058.

Apparently recognizing that his claims do not rise to the level of suggesting that the trial was a "farce" or "shocking to the conscience of the Court" Infiesta asks this Court to reject the well-settled "farce-mockery" standard in favor of the less stringent test whether "the defendant received reasonably competent representation" (Infiesta's App. Br. 24-25). This Court recently declined an invitation to adopt a new standard, *United States v. Yanishefsky*, *supra*, slip op. at 5057, n. 2, and in any event on the record before this Court there is nothing to suggest that O'Connor did not render reasonably effective assistance to Infiesta.

heroin to Del Cristo. However this argument disregarded Rodriguez' testimony that Del Cristo was looking for Ortega in order to purchase heroin and that Del Cristo had made a payment to Rodriguez for heroin. It was obvious that if the jury believed Rodriguez' testimony about these latter facts that they had to accept Gonzalez' testimony that the heroin was delivered. Yet counsel on appeal for Infiesta who also represents Del Cristo on this appeal does not argue that counsel for Del Cristo was incompetent.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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**SHIRAH NEIMAN,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Alan R. Kaufman being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of August, 1974 he served two copies of the within brief by placing the same in properly postpaid franked envelopes addressed to:

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And deponent further says that he sealed the said envelopes and placed the same in the mail drop for mailing outside the United States courthouse, Foley Square, Borough of Manhattan, City of New York.

Alan R. Kaufman

Sworn to before me this

23rd day of August, 1974.

Jeanette Ann Gray

JEANETTE ANN GRAY
Notary Public, State of New York
No. 4-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975